United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

APPELLANT'S BRIEF AND APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,363

[redacted] 346

FLORENCE [redacted] O'HILL, *Appellant*

v.

JEREMIAH J. MCCARTHY and ANNA MARIE MCCARTHY, *Appellees*

Appeal from the United States District Court for the District of Columbia

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STATEMENT OF QUESTIONS PRESENTED

1. Whether evidence that a written contract of release was characterized as a receipt is sufficient to constitute an allegation of fraud when there is no misrepresentation of fact extrinsic to the writing itself.

2. Whether evidence that a person cannot remember whether they read a contract or not is sufficient to void the contract for fraud.

3. Whether a delay of more than eight (8) months after the discovery of an alleged fraud constitutes a failure to act promptly upon discovery of the alleged fraud.

4. Whether evidence that a person fell while stepping on a small rug at the foot of a stairway constitutes sufficient evidence of negligence without any further testimony as to the condition of the rug or the floor.

5. Whether a missing witness' instruction is justified if the witness is not available in the jurisdiction is known to both parties and is an ex-employee of one of the parties.

6. If a missing witness' instruction is justified, may an argument be made that the jury may first infer the presence of a witness contrary to the evidence and then infer that the witness would testify adverse to one of the parties.

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This Court has jurisdiction by virtue of 28 U.S.C.A. 1291, and the appeal is brought pursuant to Rule 73, Federal Rules of Civil Procedure. Reference is also made to the Order of this Court of April 25, 1966 in Appeal No. 20,013.

STATEMENT OF THE CASE

This appeal is from two jury verdicts rendered on split issues tried pursuant to the procedures of Rule 42, Federal Rules of Civil Procedure. The suit was brought to recover for injuries received by Jeremiah McCarthy in a fall on premises owned by Mrs. Florence Cahill. Almost exactly one year after the fall, Mr. McCarthy signed a release of claim as to Mrs. Cahill. The release was raised as a defense to the suit and at pre-trial the Court and parties agreed that the issue of the release should be tried first and separately from the issue of liability. The release was attacked as having been obtained by fraud and was set aside by the jury. A motion for judgment NOV or new trial was filed and denied. The Appellant filed a notice of appeal which appeal was dismissed by this Court as premature. The issue of liability was tried and resulted in a verdict for Jeremiah McCarthy against Florence Cahill and for Florence Cahill as to the claim of Anna Marie McCarthy for loss of consortium.

The issue of the validity of the release was tried before the Honorable Judge John J. Sirica on November 16, 17 and 18 of 1965. The Judge rendered an opinion which appears at 249 F. Supp. 194. Judge Sirica indicated that he was astonished at the result reached by the jury on the evidence, but ruled that there was sufficient evidence to constitute a question of fact for the jury to decide. The Judge stated that he viewed the evidence in the light most favorable to the Plaintiff, which he was required to do after the jury verdict in favor of the Plaintiff and he stated that viewing the evidence in this light the jury could have found that

> . . . the agent of the defendant's insurance company represented to the plaintiffs that the document they were signing was a receipt for payment made to Mr. McCarthy for expenses not covered by his workmen's compensation, while in fact the insurance agent knew it to be a release of all liability. The jury could have also found that the agent represented to the plaintiffs

that the signing of this document would have no effect upon the balance of their claim against the defendant. The jury could have found further that when the plaintiffs signed the paper it was folded and that neither plaintiff actually read it. The jury could have believed that before they endorsed the draft which they received from the insurance company, a day or so after the release was executed, the plaintiffs never read the language on the back thereof, or if they had seen it, that they believed it was merely a matter of form, because of the representations made to them by the insurance agent. The jury could have also found that a very friendly and amicable relationship existed between the plaintiffs and the insurance agent, and that this relationship caused the plaintiffs to feel that it was unnecessary to read the paper which they thought was a receipt and which turned out to be a release.

The testimony in the case was that Mr. McCarthy was fifty-nine years of age and that his occupation was president of the McCarthy Manufacturing Company and that he considered his specialty to be electronic engineering, although he had no academic degree. (JA 45) Mr. McCarthy and Mrs. Cahill were old, although not close friends, and that shortly before Christmas of 1960 Mrs. Cahill asked Mr. McCarthy if he would obtain for her a radio which she wished to give as a present to her daughter. Mr. McCarthy did obtain the radio and on September 23, 1960 he brought the radio to Mrs. Cahill's residence. Mr. McCarthy suffered a fall while at the residence of Mrs. Cahill and he was later contacted by Mr. Antoniacci of Ellett & Short Inc., the Washington representative of Phoenix Insurance Company, which Company carried the homeowners' liability insurance on the residence of Mrs. Cahill.

Mr. McCarthy and Mr. Antoniacci had a friendly and cordial relationship. Mr. McCarthy informed Mr. Antoniacci that he did not want to make a claim against Mrs. Cahill.

Almost exactly one year after the accident Mr. Antoniacci visited Mr. McCarthy at his home, and, assuming

the truth of everything claimed by the Plaintiff, the following transpired: Mr. McCarthy reiterated that he did not wish to make a claim against Mrs. Cahill and Mr. Antoniacci told Mr. McCarthy that he would like to take care of the expenses which Mr. McCarthy's workman's compensation carrier had not covered, to which proposal Mr. McCarthy agreed. Mr. Antoniacci informed Mr. McCarthy that he would have to obtain a receipt for the money which piece of paper Mr. Antoniacci handed to Mr. McCarthy folded over so that Mr. McCarthy could not read anything on the paper except "caution, read before signing". At the same time the Plaintiff stated that the document was in blank. Mr. McCarthy did not read the document, although, he stated, and there was no contradictory evidence or inferences, that he was aware that Mr. Antoniacci represented Mrs. Cahill's interests and that if he should make a claim Mr. Antoniacci would be the person with whom he would have to negotiate. The so called receipt was signed by both Mr. and Mrs. McCarthy. The document was, in fact, a release. Mr. Antoniacci informed the McCarthys that he did not have a check with him but that he would forward it. The check in due course arrived and was endorsed by the McCarthys. The check has apparently been mislaid since it was submitted to the Court for the purpose of judgment NOV but it is set out in the footnote No. 1 of Judge Sirica's opinion. Mr. McCarthy further testified that he asked Mr. Antoniacci whether the paper he was signing would have an effect on the balance of his claim, and Mr. Antoniacci replied in the negative. Mr. McCarthy was specifically asked what claim he was talking about and he clearly said he had reference to his compensation claim. (JA 58) This, factually, is the primary difference between Judge Sirica's recollection of the evidence and what the transcript reveals the evidence was.

After the fall Mr McCarthy made a claim under his workman's compensation insurance. When the claim was

made to the compensation insurance carrier, Fireman's Fund, they, in the due course of business, put Ellett & Short on notice of a claim for subrogation. Later, Mr. Antoniacci of Ellett & Short was informed that the Fireman's Fund did not intend to press subrogation rights. (JA 78, 79)

In August of 1962, some eight months after the release was obtained by Ellett & Short, Mr. McCarthy's workman's compensation claim against Fireman's Fund was called for an informal hearing. At this informal hearing, Mr. McCarthy was told that the Fireman's Fund would not pay his workman's compensation claim because he had released Mrs. Cahill without their permission thereby releasing their subrogation rights.

Thereafter, Mr. McCarthy did nothing until February 16, 1963 when he consulted an attorney. Mr. McCarthy told his attorney that he thought he had signed a receipt but was told that he had signed a release. Suit was not filed until April 22, 1963. This was the first notice that Ellett & Short had that there would be any attack on the release obtained on December 20, 1961. (JA 63, 64).

The evidence revealed that Mr. McCarthy was the chief executive officer of his company, that he is used to signing contracts in his business and that when he had any question about contracts in his business he submitted them to his attorney, Mr. Mendelsohn. (JA 68, 69)

Judge Sirica submitted the case to the jury on this state of the evidence and the jury returned a verdict setting aside the release for fraud on the part of Mr. Antoniacci.

On May 26 and 27 of 1966 the issue of liability and the issue of damages was tried before the Honorable Charles F. McLaughlin. This trial resulted in a verdict in favor of the Plaintiff, Jeremiah J. McCarthy in the amount of $8,000 and a verdict in favor of the Defendant on the claim of Anna McCarthy for loss of consortium. Judge Mc-

Laughlin was asked to declare a mistrial because of the obviously inconsistent and irreconcilable verdicts, which motion was denied.

The evidence of liability was that Mrs. Cahill had placed a small rug at the foot of her stairs on the morning of December 20, 1960 and that Mr. McCarthy arrived late in the afternoon on that day to deliver the radio, the rug having remained in place throughout the day with no indication of anything wrong with the rug, despite traffic over it by Mrs. Cahill, her daughter and her maid. (JA 156-158) Mr. McCarthy walked over the rug on the way upstairs to deliver the radio and he did so without incident. Mr. McCarthy stepped on the rug on the way down the stairs using the same caution that he used on the way up the stairs, and he fell. (JA 133, 134) Mr. McCarthy testified that as he came down the stairway, which was circular, he was conversing with Mrs. Cahill who was at the top of the staircase, and that as he reached the bottom of the stairs he put his right foot on the rug and that he had commenced to turn to his left to exit through the doorway which was to the left of the staircase and as he did so, he went forward striking a table which was directly opposite the foot of the stairs, and that as a result of his stepping on the rug and his fall, the rug slipped out from under him. (JA 131) Mr. McCarthy, despite his description of the accident, did not break the shoulder that he presented to the table, but rather the opposite shoulder. The physical difficulty of incurring the injury which Mr. McCarthy incurred, in the manner in which Mr. McCarthy testified he incurred it, was amply demonstrated in final argument by Plaintiff's counsel when in demonstrating how the accident occurred according to Mr. McCarthy and following Mr. McCarthy's testimony step by step, Mr. Davis lurched forward presenting his right shoulder to the imaginary table. (JA 125, 135-140)

Mrs. Cahill testified that the usual procedure in her home was to put a lining down under the rug but that, due to

the excitement after Mr. McCarthy's accident she was not able to say whether or not the lining had been used on this particular day and under this particular rug. The floor in question was a new vinyl floor, the surface of which was pre-finished and had not been waxed. (JA 156-158, 159)

During the course of the testimony in the case Mrs. Cahill stated that it was her recollection that she met Mr. McCarthy at the front door on the day of the fall; Mr. McCarthy's recollection was that Mrs. Cahill's maid met him at the door. (JA 151, 132) There was also testimony that immediately following the fall the maid came to the scene of the accident and assisted in the first aid rendered to Mr. McCarthy. There was also a three way dispute between Mrs. Cahill, Mr. McCarthy and Mr. Davis as to what the weather was on the day of the fall. Mrs. Cahill testified that it was her recollection that it was snowing and that the throw rug was placed at the foot of the steps to catch moisture from persons feet; Mr. McCarthy testified that it was cloudy and overcast but not raining, and Mr. Davis, over objections, on rebuttal put in evidence that the official weather records at the National Airport on the day in question reads 100% sunshine. (JA 132, 156, 163)

The testimony at the trial was undisputed that the maid at the time of the accident was no longer in the employ of Mrs. Cahill, that she had married and was living in Winston Salem, North Carolina and that she and Mrs. Cahill occasionally corresponded, but it was approximately one year before the trial that Mrs. Cahill had heard from her. (JA 150)

There was some confusion concerning Judge McLaughlin's ruling with regard to whether the maid would be considered a so called absent witness. The Judge originally ruled that the maid was equally available to both sides. (JA 165) Plaintiff's counsel, on closing argument referred to the maid and made the classic missing witness

argument and went one step further than the classic argument by arguing that she might have been a witness to the fall despite the fact that Mr. McCarthy made no such inference. (JA 145, 146, 154, 165) Objection was made to the argument and to the Court, subsequently instructing the jury on missing witnesses.

POINTS ON APPEAL

1. There was no evidence of fraud.

2. The claim of fraud was barred as a matter of law by reason of the doctrine of Laches.

3. There was no evidence of negligence on the part of the Defendant with respect to the use of the rug on which the Plaintiff fell.

4. The Court was in error in giving the missing witness instruction and in permitting Plaintiff's counsel to argue concerning the so called missing witness inferences.

SUMMARY OF ARGUMENT

1. The Plaintiffs in this case signed two releases, as to one they claim that the Defendant's agent represented that it was merely a receipt. They also claimed that the Defendant's agent represented that the signing of the document would have no effect on the Plaintiff's compensation claim. The Defendant's agent understood that no subrogation claim would be pressed by the compensation carrier. The Plaintiffs did not read the release and could not recall whether they did or did not read the words of release appearing immediately above their signatures on the check which was endorsed separately out of the presence of the Defendant's agent and about which no representation was made.

The Plaintiffs had an obligation to read the contract which was offered, even though it was characterized as a receipt, which fact must be assumed to be true; and the

Plaintiffs had an obligation to read the contract of release contained on the check about which no representations had been made. No evidence sufficient to nullify the written contracts having been offered by the Plaintiffs, the Court should have directed a verdict for the Defendant.

2. Mr. McCarthy testified that he was made aware, in August of 1962, that the so called receipt which he had signed was in fact a release and that no compensation payments would be made because he had signed the release. Six months thereafter, Mr. McCarthy consulted an attorney and explained to the attorney that he had signed a receipt but that it was in fact a release, and that his compensation carrier would not pay compensation. A little more than two months after Mr. McCarthy consulted his attorney, suit was filed against Mrs. Cahill. During the eight months from the time of the discovery of the so called fraud until suit was filed against Mrs. Cahill, neither Mr. McCarthy nor his attorney gave notice that a claim of fraud as to the release would be made.

There is an obligation on the part of a person who alleges fraud in the execution of a written document to give notice of the claim of fraud promptly upon discovering the facts upon which the claim will be made. The lapse of eight months from the discovery of the nature of the documents in this case until suit was filed constitutes, as a matter of law, a failure to act promptly.

3. The Plaintiffs, in order to receive compensation from Mrs. Cahill or her insurance company for the injuries received by Mr. McCarthy, have an obligation to prove that the injuries were received by reason of Mrs. Cahill's failure to act as a reasonable and prudent person or, in other words, that something she did was negligent or that failure to do something was negligent. The Plaintiffs proved that Mrs. Cahill placed a small rug at the foot of her stairs on a landing which was covered with vinyl tile. Nothing more was proven by the Plaintiffs and this is insufficient

to constitute an issue as to whether the fall suffered by Mr. McCarthy was the fault of Mrs. Cahill.

4. At the time of the fall, Mrs. Cahill employed a maid who, at the time of the trial, was no longer employed by Mrs. Cahill and was married and had removed to Winston Salem, North Carolina. Mr. McCarthy was aware of the presence of the maid on the day of the fall. The maid was not offered as a witness by either side.

The question of the maid testifying was brought up and the Court stated to counsel that he felt the maid was equally available to both sides. In the course of final argument, Plaintiff's counsel made an argument based upon the absence of the maid, arguing that the jury could infer that her testimony would be adverse to Mrs. Cahill and that they might also infer that she had been an eye witness to the accident, although the evidence by neither Mr. McCarthy nor Mrs. Cahill supported this. Objection was made to this line of argument on the assumption that the Court's ruling that the witness being equally available to both sides had eliminated any so called missing witness argument. The Court thereafter gave the jury a missing witness instruction.

The maid was not a missing witness in that she was not available and was not within the control of either party and further, except for the inference on an inference that she might have been an eye witness to the fall, her testimony was merely corroborative. The argument on the missing witness and the Court supporting the argument on the missing witness inferences prejudiced the Defendant and this Court should remand for a new trial.

ARGUMENT

I

There Was Not Sufficient Evidence of Fraud to Submit This Matter to the Jury

The Appellant contended in the trial court and urges again in this Court that the Appellee's evidence with regard to the circumstances under which the release was executed was not sufficient to create any issue upon which a jury might reasonably nullify the written contracts between the Appellant and the Appellee. The burden of the trial court was to examine whether there was more than a scintilla of evidence, in other words whether there was sufficient evidence, not merely whether there was any evidence, that is whether there was any evidence upon which the jury could properly proceed to find a verdict for the Appellee upon whom the onus of proof was imposed. *Shewmaker* v. *Capitol Transit Co.*, (1949), 79 App. D.C. 102, 143 F. 2d 142; *Murray* v. *Towers*, (1956), 99 App. D.C. 293, 239 F. 2d 914. The burden of proof in a case of fraud was properly stated by the trial court to require that fraud be proved by clear and convincing evidence that representations were made, that they were material, that they were false and that they were either known to be false by the person making them or made with reckless disregard of the truth and that they were intended to induce the hearer to action and that the hearer reasonably acted upon them to his detriment. *Public Motor Service Co.* v. *Standard Oil Co.*, (1938), 69 App. D.C. 89, 99 F. 2d 124. The court further defined this burden of proof by stating that clear and convincing evidence means that the witnesses to a fact must be found to be credible and the facts to which they have testified are particularly remembered and that the details thereof are narrated in due order and that the testimony must be clear, direct, weighty and convincing. *Aetna Insurance Company* v. *Pattock*, (CCA 5th 1962) 301 F. 2d 807.

None of the Plaintiff's evidence could be said to be clear, much less convincing, but absolutely no evidence was offered that representations of fact were made or that the representations which were claimed to have been made were material, or that they intended to induce action by the Plaintiff, or that the Plaintiff properly relied upon them.

On the general question of whether the Plaintiff's evidence was clear and convincing, that is, whether the Plaintiffs were credible and whether they remembered precisely the details and could present them in due order and whether their testimony was clear, direct and weighty, it should be borne in mind that the Plaintiffs contended throughout the trial that the so called receipt was offered for signature folded over in such a manner that the only part which could be seen by the Plaintiffs was that containing the lines for signature with the legend "caution, read before signing" above it, and furthermore that the paper was in blank when it was signed. This is a patent and obvious contradiction. They either saw the paper and saw the blanks unfilled or they had no conception whether the paper was filled in or not. The Plaintiffs never did, nor could they, explain this contradiction in their evidence. It should also be borne in mind that Mr. McCarthy was unable to correctly state how he got referred to Dr. McKelvie or when he got referred to Dr. McKelvie. Mr. McCarthy first contended that he was referred to Dr. McKelvie after the informal workman's compensation hearing in August of 1962. When it was pointed out to Mr. McCarthy that Dr. McKelvie had already testified that he had examined Mr. McCarthy in April, 1962, Mr. McCarthy finally managed to explain that he was referred to Dr. McKelvie, or rather to a doctor by the Workman's Compensation Commission by telephone in March of 1962. Mr. McCarthy was not able to say whether he read the words of release contained on the check. Mrs. McCarthy's testimony with regard to the execution of the release and

the check suffered from the same contradictions and vagueness that Mr. McCarthy suffered from. Mrs. Etien, the McCarthy's daughter, testified that she was not in the room when the release was executed but was rather in the adjoining room wrapping Christmas presents and that she was not really paying attention to the conversation and could not see what papers were being referred to, but she is sure the word "receipt" was used with regard to the release. It should be borne in mind that both Mr. and Mrs. McCarthy testified there was discussion concerning the receipts which they had for medical expenses which were to form the basis of the payment offered by Mr. Antoniacci. Therefore, even though there was conversation concerning receipts admitted by the Plaintiffs, Mrs. Etien who was not present was offered as witness that a particular paper was offered as a receipt. It should also be borne in mind that Mrs. Etien had no particular reason to recall this conversation until after some question was raised with regard to what transpired and this question was raised after Mr. McCarthy was informed that it was a release. Mrs. Etien could not remember how long a period that was but she thought it was a matter of two or three months; as a matter of fact, it was in excess of eight months. Therefore, the testimony with regard to the execution of the so called receipt and that with regard to the check which also contained a contract of release is obviously not particularly remembered, the detail thereof are not narrated exactly and in due order and it is hardly clear, direct and weighty.

However, culling the various claims of the Plaintiffs, there was some evidence that the agent for Ellett and Short, Mr. Antoniacci represented that the first paper signed by the McCarthys was a receipt. This representation was established not to be material by the testimony of Mr. McCarthy, wherein he stated that he did not want to make a claim against Mrs. Cahill and was only concerned as to whether the paper would affect his workman's com-

pensation claim. The only representation therefore, which has any significance in this case is that dealing with the effect of the paper on the workman's compensation claim.

The evidence was undisputed that the compensation carrier for Mr. McCarthy had informed Mr. Antonaicci of Ellett and Short that they did not intend to press their possible third party rights against Mrs. Cahill. Further, it is clear that the alleged statement that the release would have no effect on the workman's compensation claim was a conclusion of law, not a misrepresentation of fact. Therefore, the statement with regard to the workman's compensation claim cannot be the basis of an allegation of fraud especially inasmuch as the Appellee never did test the correctness of the alleged statement as he apparently stated his claim under the Workman's Compensation Act.

Therefore, the allegation that Mr. Antonaicci represented the paper to be a receipt is not material, as conclusively proven by Mr. McCarthy's own testimony; and the representation with regard to the effect of the paper on the workman's compensation claim has not been proven to be false, but on the contrary the only evidence was that it was true, but, in any event, it constitutes an interpretation of law and not a misrepresentation of material fact.

The Plaintiffs' basic complaint is that an admittedly adverse, though friendly, party offered a piece of paper to be signed in connection with a personal injury claim and represented that it was a receipt. The person to whom this paper was offered was not distracted, was able to read, conducted a business of his own in which he had occasion to sign contracts and when there was any question about the contracts to consult his own attorney. This person and his wife did not read the paper nor even look at it but merely signed it. All the Plaintiffs had to do to become fully acquainted with the nature of the paper that they were signing, and, that it was, in fact, a release, was to look at the paper at the heading of which in large dark

letters appears "release". The Plaintiff's, Appellees, asked the nullification of a written contract for their own failure to read it. The law in this jurisdiction as in all other jurisdictions binds a person to the terms of a written contract whether they take the time to read it or not. *Paterson* v. *Reeves,* (1962), 113 App. D.C. 74, 304 F. 2d 950; *Toledo Computing Scale Co.* v. *Garrison,* (1906), 28 App. D.C. 243; *Palace Laundry and Dry Cleaning Co.* v. *Cole,* (Mun. App. D.C. 1945) 41 A. 2d 231. The *Toledo Computing Scale Co.* case supra is especially interesting inasmuch as there was a claim in that case that a salesman represented to a businessman that the paper he was signing was merely a receipt for a scale which the businessman understood he would have on a trial. The business man also testified that the paper was folded in the center and that he noticed that some of the blanks were not filled in. The paper was, in fact, a contract to purchase the scales. This court ruled that the businessman had an obligation to read the contract and could not avoid the written instrument on the mere allegation that its contents were misrepresented. The obvious necessity to protect written instruments from being lightly cast aside by the facile tongue of a dissatisfied contractor seems to be beyond the need for argument. There is no question in this case of a representation of fact outside of and independent of the contents of the writing itself such as in the classical case of *Capitol Traction Co.* v. *Sneed,* (1928), 58 App. D.C. 141, 26 F. 2d 296 wherein an insurance adjuster was accused of misrepresenting what the claimants' doctor said with regard to her injuries. In the *Capitol Traction Co.* case, of course, the claimant had no way of ascertaining the veracity of the representations by merely reading the contract. There was a misrepresentation of fact to induce the signing of the written contract. In this case, all that Mr. and Mrs. McCarthy had to do was read what they had in their hands.

There is a further question in this case separate and apart from the lengthy testimony about the signing of the

so called receipt for there are in this case, two documents of release supported by the same consideration. There was absolutely no claim that any misrepresentation was made with regard to the words of release contained on the check, and the only "clear and convincing evidence" offered by the McCarthys was that they did not know whether they read it or not.

II

The Claim of Fraud Was Barred as a Matter of Law By Reason of the Plaintiffs' Failure to Promptly Notify the Defendant of the Claim of Fraud

Mr. McCarthy testified that he discovered, in August, 1962, that the paper he had signed on December 23, 1961 was in fact a release and that the workman's compensation carrier claimed it was a bar to workman's compensation. Mr. McCarthey took no action until February 16, 1963 when he consulted his attorney to whom he explained the circumstances of executing the so called receipt and that it was now alleged to be a release. Neither Mr. McCarthy nor his attorney gave any notice to the Defendant that they would claim the release was fraudulently obtained until suit was filed against the Defendant on April 22, 1963, and, in fact, even the suit was not accompanied with any claim of fraud as to the release. In the *Capitol Traction Co.* case supra this court stated that the law requires one, seeking to repudiate a release on the grounds of fraud, to act promptly on discovering the fraud or else be deemed to have ratified it. During the entire period from August of 1962 until April of 1963, Mr. McCarthy continued to conduct his business during the conduct of which he testified he had occasion when he felt it necessary to contact attorneys but, far from acting promptly, he acted not at all until February 16, 1963 when he discussed the matter with his attorney. Neither Mr. McCarthy nor his attorney gave any notice for more than two months that they intended to sue the Defendant, much less that they claimed

there was fraud in the execution of the release. This, as a matter of law, constitutes a failure to act promptly for, as stated by this court in *Capitol Traction Co.* supra, "If, immediately after signing the release, she had been told definitely by Dr. Crowley that her ailment was the result of her accident, and that he did not state the contrary to the claim agent, and then she had waited for nearly a year, we would have another question before us."

In the *Capitol Traction Co.* supra this court discussed at length the necessity and propriety of this rule requiring a person claiming fraud to act promptly. It is submitted that reasonable men could not differ that Mr. McCarthy's delay of eight months in giving notice, and, that only implied notice, constitutes a failure to act promptly. If willy-nilly such protracted delays are to be considered jury questions in cases between individuals and insurance companies, the only intelligent thing would be to eliminate the statement of the law, as only an academic ostrich could conceive of a jury ignoring its visceral feeling and following the law. Patently the system of court and jury has no meaning at all, especially in suits involving emotional matters, if the court is to abdicate the law and the jury reigns supreme rather than equally with the judge.

III

The Plaintiffs Failed to Offer Any Evidence of Negligence on the Part of the Defendant

The Plaintiff's testimony on the issue of liability was that the Defendant placed a small rug at the foot of the staircase in her home on a floor which was vinyl tile. The Plaintiff, Mr. McCarthy, walked on the rug on the way up the stairs in the Defendant's home and he did so without difficulty; using the same care as he decended he stepped on the same rug and he fell. Unless the mere use of a small rug in one's home is construed to be evidence of negligence there was not even a scintilla of evidence that anything

Mrs. Cahill did or failed to do was unreasonable and negligent. There is no dispute that the obligation which Mrs. Cahill owed to Mr. McCarthy was to maintain her home in a reasonably safe condition and that she was not an insurer of the safety of persons entering her home. *Rule* v. *Bennett*, (D.C. Ct. of App. 1966) 219 A. 2d 491; *Ruffin* v. *Trans-Lux Theatre*, (Mun. App. D.C. 1959) 156 A. 2d 678. Plaintiff in this case offered no evidence that the floor in this case was improperly maintained or improperly constructed. The Plaintiff offered no testimony that the coefficient of friction between a rug of the type used and the floor was not reasonably safe. The Plaintiff proved that he walked through an area once safely, and fell as he returned through that area, proving only that he fell; and it has been held in this jurisdiction as in others that merely proving a fall is not sufficient to establish a prima facie case. *Rule* supra; *Ruffin* supra.

IV

The Trial Court Was in Error in Giving the Missing Witness Instruction and in Permitting Plaintiffs' Counsel to Argue the So Called Missing Witness Inferences

Both Mrs. Cahill and Mr. McCarthy testified that there was a maid present in the house on the day of Mr. McCarthy's fall. Mrs. Cahill and Mr. McCarthy were in conflict as to whether the maid or Mrs. Cahill admitted Mr. McCarthy to the house and Mrs. Cahill and Mr. McCarthy and Mr. Davis had a further conflict as to whether it was snowing, overcast and cloudy or 100% of sunshine respectively. There was no intimation by Mr. McCarthy or Mrs. Cahill that Mrs. Cahill's maid might have been an eye witness to the fall. Despite Mr. McCarthy's knowledge of the existence of the maid his counsel made no attempt to ascertain her name or her whereabouts or thereafter to depose her. The evidence indicated that this maid had

left the employ of Mrs. Cahill, that she had married and was living in Winston Salem, North Carolina, and that on occasion she corresponded with Mrs. Cahill.

As far as the Appellant was concerned the issues about which the maid could testify were not material to the issue of negligence and were merely corroborative of the credibility of Mrs. Cahill. The knowledge of Mrs. Cahill or her insurance carrier as to what the maid knew of the occurrence was, of course, self serving and not admissible, and the Plaintiffs made no attempt by discovery to ascertain what that might be, preferring apparently to argue by innuendo rather than by ascertainable fact. It is perfectly obvious that any rule which permits argument by innuendo should be applied with caution, and this is doubly so since the advent of the rules of discovery, as now an adversary may discover what a witness will say without having to call them at the trial and vouch for them as they were required to do in the days when the absent witness rule was created.

In any event, the circumstances in this case did not warrant the giving of the absent witness instruction and even if they had, Plaintiff's counsel's argument went beyond the permissible inferences under the rule to the obvious prejudice of the Defendant. The so called missing witness rule only comes into play when a party fails to call a witness who is available and who is peculiarly within the control of that party and then only if the absence of such witness is not satisfactorily explained. Mrs. Cahill's former maid was not available. She was not peculiarly within the control of Mrs. Cahill and her absence from the jurisdiction was satisfactorily explained. In fact the trial judge ruled that the maid was equally available to both sides. In view of the trial court's ruling it seemed obvious that there would be no occasion for the missing witness rule. However, on closing argument counsel for Appellee argued not

only that the maid's testimony might be adverse to Mrs. Cahill with regard to those matters which Mrs. Cahill and Mr. McCarthy had testified the maid would have some knowledge, i.e. whether she greeted Mr. McCarthy and weather conditions; but Appellee's counsel further argued an inference on an inference that they might infer that the maid was an eye witness to the fall and infer therefrom that her testimony would be adverse to Mrs. Cahill. Such argumentation was not warranted by the rules of evidence, being an inference on an inference and therefore would not have been a proper argument even if this were a proper case for an absent witness instruction. This is not a proper case for the absent witness instruction as the witness was not available in the jurisdiction and her unavailability was not the result of anything done by Mrs. Cahill. Trial court was therefore in error in giving the absent witness instruction and the Appellant's counsel's conduct in going beyond the legitimate inference of the absent witness instruction was improper and prejudicial and should not have been allowed by the trial court over objection.

CONCLUSION

The Plaintiffs, Appellees in this case claim they should not be bound by their contracts because they did not read them. There is no claim that any misrepresentation of fact, extrinsic to the contract, was made. Therefore the Plaintiffs, Appellees, should be bound by their contract. They should further be bound by the contract becuase of their delay of eight months in claiming fraud after discovering the alleged fraud.

There was no evidence that Mrs. Cahill did anything which was negligent or in fact that anything which she did caused the accident complained about in this suit.

The court was in error in giving the missing witness instruction and Appellee's argument was improper that the jury might infer from the missing witness inference not

only that the maid would testify adversely as to those matters of which she was shown to have knowledge, but also that she was an eye witness.

WELCH, DAILY & WELCH

By: WALTER J. MURPHY JR.
Attorneys for Appellant
505 Investment Building
1511 K Street, N. W.
Washington, D. C. 20005

APPENDIX

APPENDIX

Civil Docket

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 1046-'63

JEREMIAH J. McCARTHY

ANNA MARIE McCARTHY

v.

FLORENCE M. CAHILL

Attorneys

Davis & Mendelsohn
Earl H. Davis
1815-H St., N. W.,

Welch, Daily & Welch
505 Investment Bldg.

Action for

DAMAGES—PERSONAL INJURIES
(Slip & fall on Rug)
#1. $50,000.00 #2. $15,000.00

Date	
1963	
Apr. 22	Davis—Rec'd 10.00
Apr. 22	U. S. Treas.—Disb'd 10.00
1966	
Jan. 24	Murphy—Rec'd 5.00
Jan. 24	U. S. Treas.—Dis'd 5.00
Mar. 3	Murphy—Rec'd 1.10

Mar. 3 U. S. Treas.—Rec'd 1.10

June 24 Murphy—Rec'd 5.00

June 24 U. S. Treasury—Dis'd 5.00

Aug. 1 Murphy—Rec'd 1.85

Aug. 1 U. S. Treasury—Disb'd 1.85

Date PROCEEDINGS—1046-'63

1963 Deposit for cost by

Apr. 22 Complaint, appearance Jury Demand filed

Apr. 22—Summons, copies (1) and copies (1) of Complaint issued Ser 4/30/63

May 16—Motion of deft to dismiss complaint or for summary judgment; P&A; exhibit; MC 5/16/63; appearance of Welch, Daily & Welch. filed.

May 20 Opposition of pltfs to motion for summary judgment; affidavit; P&A; c/m 5/20/63. filed

Jun. 19 Withdrawal of deft's motion to dismiss or for summary judgment. filed

Jun. 28 Answer of deft to complaint; c/m 6/28/63; appearance of Welch, Daily & Welch; exhibit.

Jun. 28 Calendared (AC/N) (N)

Oct. 9 Called Pretrial Examiner

Oct. 9 Certificate of Readiness per all counsel (AC/N) filed

1965

May 20 Pretrial Proceedings (5/19/65) Pretrial Examiner

Nov. 16 Jury sworn; two alternates sworn; trial begun; respited to November 17, 1965. (Rep. E. Markwalter) Sirica, J.

Nov. 17 Trial resumed; same jury and two alternates; respited to November 18, 1965. (Rep. E. Markwalter) Sirica, J.

Nov. 18 Trial resumed; same jury and two alternates; alternates discharged; verdict for plaintiffs vs. defendant finding release signed by plaintiffs invalid. (Rep. E. Markwalter) Sirica, J.

Nov. 18 Verdict for plaintiffs vs. defendant finding release signed by plaintiffs invalid. (N) Sirica, J.

Nov. 18 Instructions of plaintiffs and defendant.

Nov. 23 Bill of costs verified by attorney for plaintiffs. filed

Nov. 29 Motion of defendant for new trial or for judgment N.O.V.; c/m 11/29/65; points and authorities; M.C. 11/29/65. filed

Nov. 30 Opposition of plaintiffs to defendant's motion for new trial or judgment N.O.V. P&A; c/m 11-30-65; MC filed

Dec. 13 Motion of deft for new trial or judgment N.O.V. argued and taken under advisement. (Rep. E. Markwalter) Sirica, J.

1966

Jan. 7 Order denying motion of defendant for judgment N.O.V., or in the alternative, for a new trial. (N) Sirica, J.

Jan. 6 Memorandum opinion denying motion of defendant for judgment N.O.V. or in the alternative for a new trial. (N) Sirica, J.

Jan. 24 Notice of appeal of defendant; deposit by Murphy $5.00 (Copy mailed to Earl H. Davis) filed

Feb. 9 Cost bond on appeal in amount of $250.00 with Phoenix Assurance Co. of New York approved Sirica, J.

Feb. 25 Defendant's Exhibits (4) filed

Mar. 3 Record on appeal delivered to U.S.C.A.; Deposit by Walter J. Murphy, Jr., $1.10

Mar. 3 Receipt from U.S.C.A. for original papers. filed

Mar. 11 Transcript of proceedings, 11-16-65, Vol. 1, Pages 1-106 Ernest Markwalter, Reporter (Clerk's Copy) filed

Mar. 11 Transcript of proceedings, 11-17/18-65 Vol. 2, pages 107-230 Ernest Markwalter, Reporter (Clerk's Copy) filed

May 20 Original record returned from United States Court of Appeals. filed

May 20 Certified copy order United States Court of Appeals dismissing appeal without prejudice to a renewal of the issue raised herein upon a subsequent appeal from a final judgment in this case. filed

May 26 Jury sworn; two alternate jurors sworn; trial begun; respited until May 27, 1966 at 10:00 a.m. (Rep. by R. Henderson) McLaughlin, J.

May 27 Trial resumed; same jury, same two alternate jurors; alternate jurors discharged; verdict; in favor of male plaintiff Jeremiah J. McCarthy vs. deft. in sum of $8,000.00; and further in favor of deft. vs. female plaintiff Anna Marie McCarthy. (Rep. R. Henderson) McLaughlin, J.

May 27 Instructions of counsel. filed

May 27 All exhibits returned to counsel.

May 27 Verdict and judgment for plaintiff Jeremiah J. McCarthy vs. deft. in sum of $8,000.00; and in favor of deft. vs. plaintiff Anna Marie McCarthy. (N) McLaughlin, J.

May 31 Bill of costs as verified by Earl H. Davis, attorney for plaintiffs. filed

Jun. 1 Costs taxed in favor of the pltff; Jeremiah J. McCarthy, in the sum of $101.00. (N)

June 22 Consent order approving $9,000.00 supersedeas bond provided such bond be posted by a surety or sureties approved by the Court. (Signed 6-21-66) (N) McLaughlin, J.

June 24 Notice of Appeal by deft from orders Nov. 18, 1965 and May 27, 1966, and Jan. 6, 1966. Deposit $5.00 by Murphy. Copy mailed to Earl H. Davis. filed

June 24 Supersedeas undertaking on appeal in amount of $9,000.00 with USF & G and Phoenix Assurance Co., of New York, approved. filed

June 27 Transcript of proceedings May 26 & 27, 1966, Pages 1-226. Robert I. Henderson, Reporter. (Clerk's Copy) filed

June 29 Transcript of proceedings 11-16-65, Vol. 1, pages 1 to 106 Ernest Markwalter, Reporter (Attorney's copy) filed

June 29 Transcript of proceedings 11-17 & 18, 1965, Vol. 2, pages 107-230, Ernest Markwalter, Reporter (Attorney's copy) filed

June 29 Transcript of proceedings May 26 and 27, 1966, pages 1-226, Robert I. Henderson, Reporter (Attorney's copy) filed

July 29 Exhibits (1 through 11, 12a through 12h, 13 through 15) of pltffs.; filed

July 29 Exhibits 6, 7 and 8 by defendant. filed

Aug. 1 Record on appeal delivered to U.S.C.A.; deposit by Walter J. Murphy, r. $1.85. filed

Aug. 1 Receipt from U.S.C.A. for original papers filed

[Filed April 22, 1963]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1046-'63

JEREMIAH J. McCARTHY and ANNA MARIE McCARTHY, (his wife), 4549 Mac Arthur Boulevard, N. W., Washington, D .C., *Plaintiffs,*

v.

FLORENCE M. CAHILL, 4646 Hawthorne Lane, N. W., Washington, D. C., *Defendant.*

Complaint

(Damages for Personal Injuries sustained by business invitee, as the result of a slip-and-fall on rug on highly polished surface.)

1. This Court has jurisdiction of the subject matter hereof, by virtue of Title 11-306, D.C. Code of Laws, 1951 Edition, as amended, and the fact that the relief herein sought exceeds the sum of $10,000.00 for each plaintiff.

2. The plaintiffs are husband and wife, respectively, are both adult citizens of the United States and residents of the District of Columbia at the address set forth in the caption hereof, and bring this action in their individual rights.

3. At all times mentioned herein, the defendant, Florence M. Cahill, was the owner in possession and control of the premises known as No. 4646 Hawthorne Lane, N. W., in the District of Columbia, and which defendant controlled and occupied as a place of residence for herself and family.

4. The male plaintiff is a sound technician by profession, and as such had been requested by defendant to purchase and deliver for her, a Zenith F.M. table model radio which she contemplated giving as a Christmas present to her daughter on Christmas day, 1960.

5. On, to-wit, Friday, December 23, 1960, the male plaintiff having ordered and received the said radio, delivered same in person to defendant's home, being admitted to the home by defendant's maid, and thereafter making delivery of the aforesaid radio to defendant in an upstairs den-libarary, on the consummation of which defendant paid plaintiff for the said radio in the approximate amount of $56.00.

6. After the exchange of good-byes, the male plaintiff then descended a circular stairway for the purpose of exiting from defendant's residence via the front door, which was the same door through which he had been admitted, and upon arriving at the bottom step of said circular starway, he stepped on a rectangular rug lying on the floor at the foot of said stairway, which rug slipped from under him, the floor being highly waxed and polished, causing said plaintiff to fall, and in the course of falling said plaintiff struck his left shoulder, and the left side of his head and face, against some object unknown to him, which in turn caused severe lacerations to plaintiff's face, from which he bled profusely, and he was otherwise seriously injured.

7. The defendant negligently and carelessly permitted the premises, and particularly the floor at the foot of said circular stairway, and a rug at the foot of said stairway, to be and remain in a dangerous and unsafe condition, which condition existed long prior to the time of the injuries sustained by said plaintiff, and of which condition the defendant had notice and knowledge.

8. The negligence of the defendant, in addition to that hereinabove alleged, consisted of: (1) maintaining the reception area floor, and the floor adjacent to the aforesaid circular stairway, in such a highly waxed and polished condition that same was caused to be excessively smooth and slippery and in a highly dangerous condition; (2) maintaining upon the slippery floor at the foot of the aforesaid

circular stairway, a rectangular rug not in any way fastened or secured to the floor, and which was likely to slip when stepped upon and cause persons upon the premises, including said male plaintiff to fall, notwithstanding knowledge that same constituted a danger and that other persons had previously fallen by the rug slipping; (3) failing to warn plaintiff of the danger, or to provide any protection to him against same.

9. Said male plaintiff was at all times exercising due care for his own safety, and was free of any contributory negligence.

10. Chief among the injuries sustained by the male plaintiff was a severe fracture of the humeral head, on the left side, with separation of the greater and lesser tuberosity of the humerus as one fracture, and a second fracture extending through the region of the anatomical neck of the humerous with some displacement of the fragments; a partial luxation of the left shoulder with the humeral head separating from the glenoid; lacerations of the head and face; numerous bruises, abrasions and contusions; a severe shock to his entire nervous system, and he was otherwise injured, said injuries being of a permanent nature. For said injuries the male plaintiff was obliged to, and did undergo, extensive hospitalization, and was put to great expense for the necessary medical, surgical, hospital, X-ray and nursing expense, in an effort to be cured thereof, he suffered, and continues to suffer, great mental and physical pain and anguish; he lost, and will continue to lose a great amount of time from his usual employment as a sound technician, with a resultant large loss of emoluments; and he was otherwise greatly injured and damaged.

11. As a result of the aforesaid injuries, sustained by the male plaintiff, Jeremiah J. McCarthy, the co-plaintiff, Anna Marie McCarthy, his wife, has lost, and will continue to lose the companionship, comfort, society and consortium of her said husband as the result of the disabling injuries

by him sustained; as well as the comfort, assistance and enjoyment of her said husband, which the said female plaintiff ought to have had and otherwise would have had, except for the negligence of the defendant.

WHEREFORE, the premises considered, the plaintiff, Jeremiah J. McCarthy, brings this action, and demands judgment against the defendant in the full sum of Fifty-thousand dollars ($50,000.00), besides the the taxable costs hereof.

AND WHEREFORE, the plaintiff, Anna Marie McCarthy, brings this action, and demands judgment against the defendant in the full sum of Fifteen thousand dollars ($15,000.00), besides the taxable costs hereof.

DAVIS & MENDELSOHN
Attorneys for Plaintiffs,

By EARL H. DAVIS
Earl H. Davis
504 Federal Bar Bldg.,
1815 H St., N. W.,
Wash. 6, D. C.

DEMAND FOR JURY TRIAL
PLAINTIFFS DEMAND TRIAL BY JURY HEREIN.

[Filed June 28, 1963]

Answer to Complaint

Comes now the defendant, Florence M. Cahill, and for answer to the plaintiffs' complaint herein, states:

FIRST DEFENSE:

Plaintiffs' complaint fails to state a cause of action upon which relief may be granted.

SECOND DEFENSE:

(1), (2), (3), (4), (5). Defendant admits the allegations of Paragraphs (1), (2), (3), (4), and (5) of the complaint.

(6) Defendant admits that plaintiff, Jeremiah J. McCarthy, descended said stairway. Defendant denies that the floor was highly waxed and polished and caused said plaintiff to fall. Defendant denies that said plaintiff was injured to the extent alleged.

(7) Defendant denies that the floor referred to was in a dangerous and unsafe condition and denies every allegation of negligence of Paragraph (7).

(8) Defendant denies each and every allegation of Paragraph (8) of the complaint.

(9) Defendant denies the allegations of Paragraph (9) of the complaint.

(10) Defendant denies that said plaintiff was injured and damaged as alleged in Paragraph (10).

(11) Defendant denies the allegations of plaintiff, Anna M. McCarthy, alleged in Paragraph (11) of the complaint.

THIRD DEFENSE: *Contributory Negligence*

Defendant states that the floor referred to in plaintiffs' complaint was not, highly waxed and polished in a danger-

ous and unsafe condition as alleged, but was merely a well cleaned and normally waxed residence floor, customarily found and in usage in average well kept homes; that said rug was such as is customarily found in such homes and use in the generally accepted and customary manner; that if said plaintiff, Jeremiah J. McCarthy, fell as alleged, it was because of his own carelessness and negligence and such injury and damage as plaintiffs suffered was the direct result of said Jeremiah J. McCarthy's sole or contributory negligence.

FOURTH DEFENSE: *Workmen's Compensation*

Plaintiff, Jeremiah J. McCarthy, was on the date of the fall complained of, 12/23/60, an employee of the McCarthy Manufacturing Co., Inc., and as such was covered by the provisions of the District of Columbia Workmen's Compensation Act; that said plaintiff made claim under said Act and filed with the Deputy Commissioner an Employee's Claim for Compensation, Case #28502-3, alleging the same accidental fall at defendant's premises, 4646 Hawthorne Lane, N. W., Washington, D. C.; that said Jeremiah J. McCarthy was paid on said claim under the provisions of said Compensation Act by the Compensation insurance carrier for McCarthy Manufacturing Co., Inc., The Fund Insurance Company, $624.85 temporary total disability compensation, and received medical care paid for by said insurer in the amount of $380.65; that said payments were under Section 7 and Section 8 of the District of Columbia Compensation Act.

The said Jeremiah J. McCarthy's rights are also subject to the provisions of Section 8, Clause C and Paragraph 19 of the Compensation Act and Section 13 of said Act as amended and approved August 19, 1959, and Section 33.

Therefore, said Jeremiah J. McCarthy has no right legally to pursue this action against defendant and same should be dismissed.

FIFTH DEFENSE: *Release*

The plaintiffs, Jeremiah J. McCarthy and Anna Marie McCarthy, did on, to wit, December 20, 1961, almost one year after said accident and after receiving compensation payments and medical care from said Compensation insurer, voluntarily sign, execute and deliver a full general release to defendant, Florence M. Cahill, for and in consideration of the sum of One Hundred Thirty-Five Dollars ($135.00), a copy of which release is attached hereto and hereby made a part of this pleading; that said release covers the same incident and fall and the same damages and injuries as alleged in plaintiffs' instant complaint; that said release is a full and legal bar to the instant action against this defendant, as to both plaintiffs.

WHEREFORE, defendant prays that the complaint be dismissed as to both plaintiffs and the defendant have judgment for her costs in this behalf against both plaintiffs.

WELCH, DAILY & WELCH

By: _____

H. M. WELCH
Attorneys for Deft.
505 Investment Bldg.
Washington, D. C.

May 19, 1965

Damages for personal injuries, due to negligence.

THE PARTIES AGREE TO THE FOLLOWING STATEMENT OF FACTS AND STIPULATE THERETO: D was the owner and in possession and control of the premises known as 4646 Hawthorne Lane, N. W., Wash., D. C. Ps are husband and wife, and on Dec. 23, 1960, at the aforesaid premises, male P suffered an accident when in the premises for the purpose of delivery a Zenith FM table-model radio which he had sold to D. The accident was a fall at the foot of the stairs connecting the first and second floors of D's premises.

NOTES: The case involves a release and the validity thereof. The Examiner recommends, and the parties agree, that the issue of the validity of this release should be determined separately and apart from the other issues of the action.

PLAINTIFFS CLAIM that the male P, after stepping on a rectangular rug on the floor, the rug slipped, causing his fall.

They assert that the fall, injuries and damages, sustained by them were caused by the negligence of D, in permitting the premises, particularly the floor at the foot of the stairway, and a rug at the foot of the stairway, to be and remain in a dangerous and unsafe condition, in that the floor was highly waxed and polished, excessively smooth and slippery, in turn causing the rectangular rug which was not in any way fastened or secured to the floor, to slip when normally stepped upon; that D knew, or should have known of this dangerous and unsafe condition, and D failed to warn P thereof or to provide a protection against same.

The physical INJURIES sustained by male P, has claimed SPECIAL DAMAGES, and the claims of P, Anna Marie McCarthy, are set out in the statement attached hereto, made

a part hereof, and incorporated herein by reference, marked "A".

DEFENDANT denies any negligence and asserts that the place where the accident occurred was maintained in a reasonable and proper manner; asserts that the accident was the result of the sole or contributory negligence of male P, in that if the premises were in the condition claimed by P, then P should have noticed same on entering the house or he failed to see what was there to be seen.

D denies Ps were injured and damaged as claimed. Further, D avers that both Ps signed a general release on the 20th day of Dec. 1961, releasing the D from all claims for the sum of $135.00, and that the Ps endorsed the check in the amt. of $135.00 which contained immediately above the endorsement the statement that "This draft must be endorsed by payee personally and such endorsement shall constitute a release in full for account shown on reverse side." On the reverse side a notation is made that the check is offered in payment of claim for injuries sustained on Dec. 23, 1960.

Male P was on the date of the accident an employee of the McCarthy Manufacturing Co., Inc. As such, was covered by the provisions of the D of C Workmen's Compensation Act. That P made claim under the act and filed with the Deputy Commissioner, Case No. 28502-3, alleging the same accidental fall on the D's premises and that the P was paid on said claim under the provisions of the Workmen's Compensation Act by the insurance carrier the Fund Insurance Co. The insurance company paid a total of $624.85 and medical expenses in the sum of $380.65. By the provisions of the Workmen's Compensation Act Ps are not the proper parties in interest as this third party suit was not instituted within six months of the compensation claim as required by the D of C Workmen's Compensation Act and the right to bring the action is by the operation of the rules of subrogation and the D of C Compensation Act vested in the Fund Insurance Co.

STIPULATIONS

Following may be admitted in evidence without formal proof, subject to all legal objections: records of Georgetown U. Hosp.; HEW Mortality Table; release and photostat of draft, initialed by Examiner; records of D of C Workmen's Comp. Commission re male P; Dept. of Labor Work Life Tables.

The parties agree to the mutual exchange of all medical reports of examining or treating physicians, now in hand, on or before June 10, 1965, and a similar exchange of all other such reports within 48 hours of the alert of this case for trial.

Counsel for P agrees to make the P available for the purpose of a physical examination by physician of D's choice before, but not to interfere with, trial.

Counsel for D agrees to allow counsel for Ps or their representative to photograph the portion of the premises on which accident occurred, subject to the reasonable convenience of the D. following which photos may be admitted in evidence without formal proof*

Ps admit the signing of the alleged "release", but aver that same is invalid for fraud, and for mutuality of mistakes, since same was signed without full knowledge of the nature and extent of P's injuries.

The Examiner has requested counsel for the parties to appear at trial with the maximum amount of authority to settle this case which will be allowed them by their principals.

FINN
Pretrial Examiner

TRIAL COUNSEL:

_____

EARL H. DAVIS, ESQ. for Ps

_____

H. MASON WELCH, ESQ. for D

* subject to all legal objections.

[Filed Nov. 29, 1965]

Motion for New Trial or for Judgment Non Obstante Veredicto

Comes now the defendant Florence M. Cahill, by and through her attorneys, Welch, Daily & Welch, and moves this Court for a new trial or for judgment non obstante veredicto and as reasons therefor states:

1. There was not sufficient evidence to meet the plaintiffs burden of proof and the Court should have directed a verdict.

2. The plaintiff failed to act with reasonable promptness after discovering what is alleged to have constituted fraud therefore must be deemed to have ratified his act.

3. The testimony and evidence of the plaintiff failed to establish all the elements required in a case of alleged fraud.

WHEREFORE the defendant asks the Court to grant a new trial or grant judgment N.O.V.

Respectfully submitted,

WELCH, DAILY & WELCH

By _____

WALTER J. MURPHY, JR.
Attorneys for Defendant
1511 K Street, N. W.
Washington, D. C. 20005

[Filed Nov. 30, 1965]

Points & Authorities in Opposition to Defendant's Motion for New Trial or for Judgment N.O.V.

Comes now the plaintiffs, by and through counsel, and opposes the defendant's pending motions for new trial or for judgment n.o.v., for the following reasons:

1. The said motion was not timely filed.

2. The said motion raises no new matter that was not raised at trial and fully argued to the court and jury.

3. The said motion is not well taken, but is taken only for the purpose of delay, since the issues of liability and damages should be tried before a December jury, which event the defendant is attempting to forestall.

4. The verdict of the jury voiding the alleged release herein was in accord with the evidence and the weight of the evidence.

5. The verdict of the jury was in accord with the law, and the court's instructions.

6. And for other reasons apparent from the record.

EARL H. DAVIS
Earl H. Davis,
Attorney for Plaintiffs,
504 Federal Bar Building,
1815 H Street, N. W.
Washington 6, D. C.

AUTHORITIES

Rule 59 (b), F.R.C.P., provides:

"A motion for new trial *shall be served* not later than 10 days after the entry of the judgment."

The judgment herein was entered on November 18, 1965. The said motions of the defendant were served on plaintiff's counsel on November 30, 1965.

Rule 50 (b) F.R.C.P. (governing motions for judgment n.o.v.) provides: "* * * Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict;"

Rule 6 (b), F.R.C.P., provides:

> "ENLARGEMENT. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; *but it may not extend the time for taking any action under Rules 50 (b), 52 (b), 59 (b), (d) and (e), 60 (b), and 73 (a) and (g), except to the extent and under the conditions stated in them.*"

There was no request for extension of time within which to act, by either motion or otherwise; and it can be readily seen that by virtue of Rule 6 (b), as amended, it is expressly provided that the court may not extend the time periods stated in these subdivisions.

Just last year, our U.S. Court of Appeals for this Circuit, in *Graham* v. *Pennsylvania Railroad,* 119 U.S. App. D.C. 335, 342 F. 2d 914, stated:

> "* * * We think the Supreme Court expected lawyers with any serious pretensions to practice in the federal courts to become familiar with rule changes on or shortly after their effective date. That expectation was not, under the circumstances, irrational or arbitrary in the large, and we do not reverse the District Court for its recognition of it in this particular instance."

The Supreme Court has held, in *Dice* v. *Akron, C. & Y. R. Co.,* 342 U.S. 359, 72 S. Ct. 312, 96 L. Ed. 398 (1952), that where a release is attacked for fraud, the rule in the Federal Courts is that a question of fact is presented for a jury's determination, not a question of law for determination by a court as an equity, or legal question.

The trial court in the instant case recognized this as the law, when it denied the defendant's motion for directed verdict at the end of plaintiff's case (thereby recognizing that a prima facie case had been made out); and again, a fortiorari, at the end of the whole case, when it again denied the defendant's motion for directed verdict.

Defense counsel now makes the same argument, in his motion, that he made to the jury in this case; which the jury did not go for, and which action is now controlling.

When defense counsel states, on page 2 of his motion, that—"In fact, the only thing which the jury's verdict in this case demonstrates is that no matter what the evidence an insurance company cannot obtain a just verdict", he simply demonstrates his own pique, and a remarkable lapse of memory as to the actual evidence before this jury. Both plaintiffs, and their adult daughter, testified that the only witness produced by the defendant, i.e.—Antoniacci, represented that the paper he was then having them sign was

a "receipt" for monies to be paid on account; that same would not affect the "balance" of plaintiffs' claim; that he never correctly represented the said paper as a "release"; and that relying on his statements and the truth thereof, they did not read the said paper. Antoniacci, of course, denied that he did so. This presented a typically factual question as to the credibility of the parties involved, and the jury, by its verdict, apparently believed the plaintiffs.

Chesapeake & O. R. Co. v. *Howard,* 14 App. D.C. 262, affd. (1900), 178 U.S. 153, 20 S. Ct. 880, 44 L. ed. 1015
Wash. Rwy. & Elec. Co. v. *McLean,* 40 App. D.C. 465
Rockwell v. *Capital Traction Co.,* 25 App. D.C. 98

In *Capital Traction Co.* v. *Sneed,* 58 App.D.C. 141, 26 F. 2d 296, certiorari denied, Capital Traction Co. v. Newmyer, 49 S. Ct. 10, 278 U.S. 604, 73 L. ed. 531, it was held that laches or undue delay in renouncing release of liability for personal injuries after discovery of fraud, was HELD to be a question of fact for the jury.

The case cited by defense counsel in his motion, i.e.—*Paterson* v. *Reeves,* 113 U.S. App. D.C. 74, 304 F. 2d 950 (1962), involving former Judge Reeves of the Municipal Court, is not in point, that being an attempt to set aside a contract for "mistake of fact". The Court of Appeals specifically noted, in its opinion, that—"He did not alleged fraud" (at p. 75).

Wherefore, for the reasons and points above set forth, the pending motions should be promptly overruled and denied; and this case certified for prompt disposition of the remaining issues herein as to liability and damages.

EARL H. DAVIS
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Washington 6, D.C.

[Filed January 7, 1966]

Order

The Court having considered the motion of the defendant in the above-entitled action for judgment notwithstanding the verdict, or in the alternative, for a new trial, and for the reasons stated in its opinion of this date, the Court believing that the verdict of the jury was in accord with the law and the evidence introduced in open Court, now, therefore, it is by the Court this 6th day of January, 1966,

ORDERED that the motion of the defendant for judgment notwithstanding the verdict, or in the alternative, for a new trial, be, and the same hereby is, denied.

s/ JOHN J. SIRICA
United States District Judge

Opinion

This matter comes before the Court on the defendant's motion for judgment notwithstanding the verdict, or in the alternative, for a new trial. An action was filed by the plaintiffs for damages allegedly suffered by them, as a result of a fall by Mr. McCarthy in the home of the defendant on December 23, 1960. In addition to denying negligence on her part, the defendant introduced a release signed by both of the plaintiffs which purports to discharge the defendant from any further liability. The plaintiffs maintain that this release was the result of fraud on the part of the agent of the defendant's insurance carrier.

Pursuant to Rule 42, *Fed. R. Civ. P.*, a separate trial was had on the issue of the validity of the release, which resulted in a jury verdict for the plaintiffs setting aside the release. As grounds for setting this verdict aside, the defendant urges that the evidence did not establish the elements of fraud; that it was insufficient to meet the plain-

tiffs' burden of proof; and that the plaintiffs failed to act with reasonable promptness after discovering what is alleged to have constituted fraud, and that, therefore, they must be deemed to have ratified the alleged fraud. The plaintiffs, on the other hand, assert that the defendant's motion was not timely filed; and that the evidence was sufficient to establish fraud and to meet their burden; and that there was no conduct on their part constituting ratification.

Initially, the Court is of the opinion that the plaintiffs' argument that the motion comes too late is not well taken. Assuming, without deciding, that the jury verdict setting aside the release in this case is a "judgment" under Rule 54 of the Federal Rules of Civil Procedure, Rules 50(b) and 59(b) allow ten days from the entry of judgment to file motions for judgment notwithstanding the verdict and for a new trial. Although this time may not be enlarged, *Fed. R. Civ. P.* 6(b), an additional day is allowed if the last day of the period falls upon a Saturday, a Sunday or a legal holiday, *Fed. R. Civ. P.* 6(a). In the instant case, the jury verdict was returned on November 18, 1965, and the defendant's motions were filed on November 29, 1965. However, November 28 was a Sunday and accordingly, the filing on November 29 was timely.

As to the claim of ratification, the defendant asserts that on the basis of the fact that the alleged fraud was discovered in August of 1962, and that no mention of it was made until April of 1963, when suit was filed, the plaintiffs should be precluded from raising it. Although the plaintiffs' reliance upon *Dice* v. *Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952), appears misplaced, this Court cannot say as a matter of law that this delay was of such unreasonable duration that the plaintiffs should be deemed to have ratified the alleged fraud, especially since the

defendant has not indicated that she has been prejudiced in any way in the presentation of her defense.

It seems to be beyond dispute that to establish fraud, a party must show, by clear and convincing evidence, *Public Motor Serv., Inc.* v. *Standard Oil Co.*, 69 U.S. App. D.C. 89, 99 F. 2d 124 (1938), the following elements:

> (1) A representation. (2) Its falsity. (3) Its materiality. (4) The speaker's knowledge of its falsity or ignorance of its truth. (5) His intent that it should be acted on by the person and in the manner reasonably contemplated. (6) The hearer's ignorance of its falsity. (7) His reliance on its truth. (8) His right to rely thereon. *Heckenkamp* v. *Kennedy*, 267 F. 2d 887, 891 (8th Cir. 1949); see *United States* v. *Kiefer*, 97 U.S. App. D.C. 101, 228 F. 2d 448, *cert. denied*, 350 U.S. 933 (1956).

The defendant maintains that the evidence of fraud was not clear and convincing; that any representations made were not material; and that the plaintiffs cannot claim a right to rely on any representations made to them.

Viewing the evidence in the light most favorable to the plaintiffs, which the Court must do, the jury could have found "that the agent of the defendant's insurance company represented to the plaintiffs that the document they were signing was a receipt for payment made to Mr. McCarthy for expenses not covered by his workmen's compensation, while in fact the insurance agent knew it to be a release of all liability. The jury could have also found that the agent represented to the plaintiffs that the signing of this document would have no effect upon the balance of their claim against the defendant. The jury could have found further that when the plaintiffs signed the paper it was folded and that neither plaintiff actually read it. The jury could have believed that before they endorsed the

draft [1] which they received from the insurance company, a day or so after the release was executed, the plaintiffs never read the language on the back thereof, or if they had seen it, that they believed it was merely a matter of form, because of the representations made to them by the insurance agent. The jury could have also found that a very friendly and amicable relationship existed between the plaintiffs and the insurance agent, and that this relationship caused the plaintiffs to feel that it was unnecessary to read the paper which they thought was a receipt and which turned out to be a release."

While this Court does not believe from the evidence that the insurance agent intended to mislead the plaintiffs or that he knowingly made any false statements to the plaintiffs, the fact that the Court would have found in favor of the defendant does not mean that the jury's verdict should, for that reason alone, be set aside. Although the Court has the right to comment to the jury on the evidence, it is not the trier of the facts. See *Quercia* v. *States*, 287 U.S. 466 (1933). The plaintiffs' testimony was not wholly

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[1] In pertinent part the draft as introduced into evidence reads as follows:

Front:

PHOENIX OF LONDON GROUP

Issued at: Washington, D. C. December 20, 1961 Policy No.: H191046. Insured: Florence M. Cahill. Loss No.: PH49-5-41. Claimant: Jeremiah J. McCarthy. Date of Loss: 12/23/60. Line: OPI. Agcy.: Ellett & Short, Inc. Upon Acceptance: Jeremiah J. McCarthy and Anna M. McCarthy, individually and as Husband and Wife. Pap to the Order of the sum of: One Hundred Thirty Five and 00/100--Dollars ($135.00) in payment of: claim for injuries sustained on 12/23/60.

ELLETT & SHORT, INC.
BY: /s/ Gene E. Antoniacci
Loss Department

Back:

This draft must be endorsed by payee personally and such endorsement shall constitute a release in full for account shown on reverse side.
Make all endorsements below

/s/ Peremiah J. McCarthy
/s/ Anna M. McCarthy

without confusion, but if the testimony of the plaintiffs and their daughter is to be believed, and apparently the jury did so, the evidence is sufficient to meet their burden of proof, and thus a jury question was raised. See *Southwestern Greyhound Lines* v. *Buchanan,* 126 F. 2d 179 (5th Cir.), *cert. denied,* 317 U.S. 646 (1942). This Court is a great believer in the jury system and although it may sometimes disagree with a jury verdict, it will not set one aside unless it is clearly erroneous.

The defendant's next contention is that the representations made as to the nature of the paper signed by the plaintiffs were not material. However, as the Court remembers the testimony, the plaintiffs testified that the insurance agent said that the signing of the paper would have no effect on the balance of their claim against the defendant. Obviously, if such a statement was made, and the Court is not indicating a belief that this is the case, it would be material. *Accord Elledge* v. *Cornelius,* 86 F. Supp. 766 (W.D. Okla. 1947).

The final contention advanced by the defendant is that the plaintiffs cannot claim that their reliance on the agent's representations, if any were in fact made, was reasonable. This contention raises significant questions and the Court will examine the authorities on this point. "The inveterate policy of the law is to encourage, promote and sustain the compromise and settlement of disputed claims." *Tulsa City Lines, Inc.* v. *Mains,* 107 F. 2d 377, 380 (10th Cir. 1939). Still, if a settlement was the product of a fraud upon which a party relied, it will be set aside. See *Ibid.* While it is the policy of the law to protect the dignity of contracts, there is equally as strong a policy to protect the gullible from sharp practices and not to allow a wrongdoer to profit from his wrong.

As indicated earlier, a person claiming to have been harmed by a false representation must have a right to rely upon the representation, and this plainly presupposes that

the party is justified under all of the circumstances in relying on it. 3 *Pomeroy, Equity Jurisprudence* § 891 (5th ed. Symons 1941). A question often arising in these cases is whether the party had a duty to investigate the representation made to him. If so, any knowledge that might have been gained by such an investigation is considered as gained, see *Palace Laundry Dry Cleaning Co.* v. *Cole,* 41 A. 2d 231, 232 (Munic. App. D.C. 1945) (dictum), because the general rule is "one who signs a contract which he had an opportunity to read and understand is bound by its provisions," *Patterson* v. *Reeves,* 113 U.S. App. D.C. 74, 75, 304 F. 2d 950, 951 (1962).

In recent years there appears to have been a trend in this area away from the theory of caveat emptor. See *Sainsbury* v. *Pennsylvania Greyhound Lines,* 183 F. 2d 548, 551 (4th Cir. 1950). Such a trend is certainly proper for it seems unfair to allow a wrongdoer to defend on the ground that his word should not have been believed. The Restatement of Torts indicates that in some circumstances an investigation into the truth or falsity of a representation is not necessary to justify reliance upon it. See *Restatement, Torts,* § 540 (1938). This would seem especially true where such an inquiry would be expensive, difficult or demand a certain amount of expertise not possessed by the party, or where the truth of the matter would be particularly within the knowledge of the person making the representation. See, *e.g., Stein* v. *Treger,* 86 U.S. App. D.C. 400, 182 F. 2d 696 (1950). However, where the truth or falsity of the representation is obvious on its face, or if a mere cursory glance would have revealed its falsity, the party would not necessarily be justified in relying upon the representation, see Restatement, *op. cit. supra* § 540, comment b; § 541 and comment a, the rationale being that if something is apparent to ordinary observation it cannot be ignored, see *Sainsbury* v. *Pennsylvania Greyhound Lines, supra* at 551. In the last analysis, then, whether there is a duty to inquire in a particular case depends on

what is reasonable under the circumstances. See *Chesapeake & O. Ry.* v. *Howard*, 14 App. D.C. 262, 294-5 (1899), *aff'd*, 178 U.S. 153 (1900). If under all of the circumstances it would be reasonable to rely solely upon the representations made, then a failure to investigate will not preclude a party from moving to set aside the transaction. On the other hand, if under all of the circumstances it would be unreasonable to rely solely upon the representations made, then the party will be bound by his action.

With the foregoing principles in mind, the Court will examine the circumstances surrounding the transactions involved herein to determine if it was reasonable for the plaintiffs to fail to read the papers which they signed, or if they did read them, whether they should have relied upon the representations they said were made to them. The evidence in this case indicates that neither of the plaintiffs were persons of considerable education. While Mr. McCarthy was a businessman, the president of his own company, it appears that the business was by no means a large one but rather a small one which was more or less a family affair. Further, it appears that neither Mr. nor Mrs. McCarthy were trained in business but that his experience was in the field of electronics and his work consisted primarily in the sale and repair of electrical appliances. As indicated earlier, the plaintiffs and the insurance agent became quite friendly after Mr. McCarthy's accident. The plaintiff, Mr. McCarthy, and the agent were both Roman Catholics and the testimony indicated that they discussed at some length the desire of the agent to join the Knights of Columbus, of which Mr. McCarthy was a member. And further, around the time when the plaintiffs signed the release in question here, Mr. McCarthy presented the agent with a Christmas present.

In view of these circumstances, the Court cannot rule that as a matter of law it was unreasonable for the plaintiffs to sign without inquiring into the contents of the document even though they never denied having an opportunity

to read it. In addition to the opportunity available for examination, the Court feels that the relationship between the parties must also be considered in determining whether the plaintiffs acted reasonably, and that because of the relationship here, it was not unreasonable as a matter of law for the plaintiffs to trust the agent and rely solely upon what he allegedly said. As stated earlier, the Court is not indicating its belief that any false representations were made but is merely accepting the jury findings for the purposes of these motions.

The relationship between the parties must also be examined in determining the reasonableness of the plaintiffs' signing of the draft a short time after they signed the release. Although the evidence indicated that the insurance company's agent was not present when the plaintiffs signed the draft, and even assuming that the plaintiffs read the language on the draft, the jury could have found that they were still under the influence of the representations allegedly made to them and that, having no reason to distrust the agent, they considered the language on this draft to be merely a matter of form. The Court cannot say that, as a matter of law, such a finding would be incorrect, or that the plaintiffs' actions were unreasonable under these circumstances.

For the foregoing reasons, the motion of the defendant for judgment notwithstanding the verdict, or in the alternative, for a new trial, is denied.

s/ JOHN J. SIRICA
United States District Judge

January 6, 1966

Notice of Appeal

Notice is hereby given this 24th day of January, 1966, that the defendant, FLORENCE M. CAHILL hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 18th day of November, 1965 in favor of the plaintiffs Jeremiah J. McCarthy and Anna Marie McCarthy against said defendant Florence M. Cahill, and the Order of the Court dated January 6, 1966.

WELCH, DAILY & WELCH

WALTER J. MURPHY, JR.
Attorney for Defendant
1511 K Street, Northwest
Washington, D. C.

[Filed Apr. 25, 1966]

Order

On consideration of appellees' motion to dismiss this appeal, of appellant's reply thereto, and on consideration of the original record on appeal herein, it is

ORDERED by the court that appellees' aforesaid motion is granted and this appeal is dismissed without prejudice to a renewal of the issue raised herein upon a subsequent appeal from a final judgment in this case.

Per Curiam.

Notice of Appeal

Notice is hereby given this 1st day of June, 1966, that the defendant, Florence M. Cahill hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 18th day of November, 1965 and 27th day of June, 1966 in favor of plaintiffs, Jeremiah J. McCarthy and Anna Marie McCarthy against said defendant, Florence M. Cahill and the defendant also appeals from the Order of the Court dated January 6, 1966.

WELCH, DAILY & WELCH

By: WALTER J. MURPHY, JR.,
Attorney for defendant
1511 'K' Street, N.W.,
Washington, D. C.

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS. TUESDAY, NOVEMBER 16, 1965

2 PROCEEDINGS

(A jury was duly empaneled and sworn, after which the following occurred:)

The Court: All right, you may proceed.

Opening Statement on Behalf of the Plaintiffs

Mr. Davis: Ladies and gentlemen, supplementing my prior remarks on the voir dire examination, we will show you by the evidence in this case that this accident occurred on December 23d, 1960.

After making this delivery of the table model Zenith radio, Mr. McCarthy having made the delivery to the second floor of the home of Mrs. Cahill, and after being paid for the radio, I think about approximately $56.00, he started out by the same door that he came in, and as he was coming down the steps, which were red carpet, he was passing the usually amenties with Mrs. Cahill, Merry Christmas and so on, this being December 23d, and as he stepped on the bottom step, where this rectangular scatter rug, approximately 30 by 40 inches, was, he was precipitated forward, and as he fell, he struck his left face and left shoulder against a marble table, with very sharp edges, as you will see from the pictures.

He immediately let out a scream, and as a result of the facial lacerations, he lost approximately two pints of blood right there at the time.

3 The evidence will further show that as a result of this scream, Mrs. Cahill immediately came down, with the French maid she had, and they were able jointly to get Mr. McCarthy, who is a rather large man, as you can see, to the first floor powder room.

Prior to that, a small cocker spaniel dow owned by Mrs. Cahill had been lapping up Mr. McCarthy's blood as fast

as he bled, and she got him into this powder room and washed him off.

Not knowing the full extent of his disability at that time, Mr. McCarthy then went on home. Then the pain started in his left shoulder, and that same day, he was taken to the Georgetown University Hospital, where he was x-rayed, and found to have a fracture of the humeral neck, which is the big bone between the elbow and the shoulder, and a fracture of the clavicle, two fractures.

His entire shoulder was placed in a cast, which he wore for a period of 6 to 8 weeks. He was then discharged from the hospital the same day as admitted, with this cast, that had been put on by Dr. Robert Rush, an orthopedic physician.

And the evidence will show approximately less than a week after the accident, he was visited by a claims adjuster, this man Antoniacci, who gave him his card, Gene E. Antoniacci and Mr. Antoniacci then saw the condition Mr. McCarthy was in, and he was immediately conversant with the nature and extent of his injuries, and then by reason of the fact that this was an employment connected injury, Mr. McCarthy being the President of his company, and this delivery of the radio being in the course of his business, it was handled as a compensation matter, and his company's compensation carrier was the National Surety Corporation.

They paid Mr. McCarthy compensation at a certain rate, for a period of some 8 or 10 weeks—I forget the exact amount, but that will be shown by the evidence.

They also paid the medical expenses of Dr. Rush, and Dr. Diley for x-rays, and the hospital, and then when a question came up in August, 1961—I am sorry, August, 1962—when he was asked to come in to what is known as an informal conference, by reason of the permanency of his injuries, so that an award could be made on the basis of permanent disability, his own insurance carrier, National Surety Corporation, then raised the point that he had

voluntarily settled his claim, without their knowledge or consent.

That brings us back then to the evidence of what took place on December 20th, 1961, almost a year after the accident, when Mr. Antoniacci made his second visit to the McCarthy home.

At that time he was fully aware of the nature and extent of Mr. McCathy's injuries, and the permanency, because when Dr. Rush discharged him from further care, he discharged him with a permanent partial disability of 15 per cent.

At the suggestion of Mr. Peroni of the Compensation Board, Mr. McCarthy was asked to give an evaluation of a second physician, and he was then examined by Dr. Allan McKelvie, an orthopedic physician, who gave him his examination, which was some time later, and gave him a permanent disability of 30 per cent. He has just recently been examined, about a year after that first examination, by Dr. McKelvie, and now he denotes he has got a 40 per cent permanent disability.

But referring back to December 20th, 1961, when Mr. Antoniacci again appears upon the scene, he found the family just preparatory for Christmas, Mrs. McCarthy was addressing cards, and the daughter wrapping Christmas presents.

He brought up the subject again, and he asked Mr. McCarthy, Have you been keeping a record of your parking lot fees to and from the doctor's office and the hospital?

He had to go back for extensive physiotherapy.

And also of your medication, and Mr. McCarthy had been keeping such a record, and be brings out a sheaf of bills that at that time approximated, I think, $85.00.

Now, Mr. Antoniacci then said: Well, I will make it $135 at this time, but I want a receipt for it.

Mr. McCarthy asked him: Will this affect the balance of my claim?

Oh, no, this is just a receipt for moneys paid on account now.

So then he was handed a paper, which defense
6 counsel will offer in evidence, which now turns out to be a release, signed by both Mr. and Mrs. McCarthy, but which was not filled out at the time they signed it.

Then, Mr. Antoniacci told him, on December 20th, 1961: I don't happen to have a check or the right check with me, but I will mail you one when I get back to the office.

Two days later, true enough, a check for $135 did appear in the mail, and Mr. McCarthy cashed it.

The evidence will show that the dealings were so informal between this adjuster and Mr. and Mrs. McCarthy, and the daughter, who was present at all times, and on such a friendly basis, that they took him at his word, and they believed that this was a receipt for money then being paid, not finishing the whole claim, and as a matter of further evidence of the good spirits between them, the three of them, Mr. McCarthy even gave Mr. Antoniacci a bottle of bourbon whisky, I believe it was Old Crow whisky, this being just before the holidays, which Mr. Antoniacci accepted.

Then this came up, when he realized he had permanent injuries about to be rated by the Compensation Board, and when he went back to Ellett & Short for the balance of his claim, as he had been assured by Mr. Antoniacci would not be affected by the signing of this receipt, Ellett & Short then told him: You have released your claim; you have no further claim.

We will show you by this evidence that had he
7 known that, he would not have signed this so-called release, which he assumed, which had been represented to him as a receipt, not a release, and he certainly would not have released a claim which now involves a 40 per cent permanent disability, and with out-of-pocket special damages, which we will show you, the Georgetown

University bill, the original bill, $31.00. The Georgetown Anesthesia Association, $20.00.

Georgetown University Hospital when he was admitted in March of '61, $72.65.

Dr. Russell B. Diley for x-rays, $47.00.

Dr. Robert Rush, $210.00.

Twelve weeks immediate loss of earnings at $140.00 a week, $1,680.00.

Then medications and parking lot fees for therapy, $85.00.

This totals $2,145.65.

We will show you that this so-called release was obtained by the fraud and misrepresentation of Mr. Antoniacci, and as such is completely invalid and has no legal effect whatsoever, that being the only issue before you, ladies and gentlemen of the jury.

. . . . . .

10 **Opening States on Behalf of the D**

Mr. Murphy:

. . . . . .

11 Now, when this accident occurred, it was reported to the insurance company by Mrs. Cahill, and in the normal course of business, the insurance company sent an adjuster to see the gentleman who was injured.

The adjuster was also sent to see the place of the accident, to investigate the accident, and to report back to the insurance company as to what the situation was.

When he first contacted Mr. McCarthy, and later Mrs. Cahill, he was told by both that they were friendly, personal friends, and Mr. McCarthy stated that he wanted to make no claim against Mrs. Cahill, and that they were very friendly, and that after all, he just slipped,

12 there was no fault, and he didn't want to press a claim against Mrs. Cahill.

The adjuster, of course, when you have an open file, as you will be shown, that the normal thing in the insurance

company is that you cannot close a file until the so-called statute of limitations runs, or you get a release, so that the insurance company can then say that their file is closed.

So periodically the local insurance company is asked by the home office, What is going on in Claim No. so and so?

So even though Mr. Antoniacci is told that no claim will be made, he has to keep in touch once in a while.

You will also be shown, as has been said, that there was a compensation claim made. I don't know whether you are all familiar with Workmen's Compensation, but if you are injured on your job, you are entitled to certain compensation, depending upon the statute involved, and that is determined by the statute not a jury trial.

Mr. McCarthy made such a claim, and his hospital bills and doctor bills were taken care of under the compensation, and he received a certain amount of money per week.

You will also be shown, and this gets into the area of the law, but to understand the defendant's position, I have to present it to you as part of the factual situation, and the insurance company which I represent in this particular instance, normally Mrs. Cahill, but in this part of the litigation we are talking about the insurance company,

13 and it was put on notice by a written letter from Mr. McCarthy's insurance carrier under the Workmen's Compensation Act, as provided by law, that if we were held liable to Mr. McCarthy, we would have to pay the compensation carrier for whatever they paid Mr. McCarthy.

This is also standard procedure with insurance companies, that if a workman is injured, and a third party may be liable, the insurance company puts that third party on notice that they may end up paying the compensation.

This notice was sent, and the compensation carrier investigated the accident, and the compensation carrier later informed the insurance carrier that I represent that they did not consider that there was any liability on our part to Mr. McCarthy, and that they would not press their

claim to us for compensation collection or subrogation in the matter.

Thereafter, as has been told you, Mr. Antoniacci made one of his contacts with Mr. McCarthy, and he told them he would like to close his file.

Mr. McCarthy said, Well, he didn't want any claim made against Mrs. Cahill, that they were very friendly, and in fact, Mr. McCarthy got much of his business by references from Mrs. Cahill's, Father Cahill and that he didn't want to make a claim.

And Mr. Antoniacci explained the difficulty of having to keep a file open, and having to report to the home office as to what it was all about, and finally Mr. Antoniacci
14 said, and it was explained on a very, very friendly basis, and he said, Well, haven't you got some expenses that have not been covered by the Workmen's Compensation, and I will pay you these, and Mrs. Cahill will never know the difference, and I can close my file, and sign a release.

It was not about 80, it was not about 90, but it amounted $135.00.

Mr. Antoniacci's file will show that at the time that the release was obtained, he had the bills listed, and it was $135.00 that he was told by Mr. McCarthy.

So at that point he was paid for the bills which the compensation carrier had not compensated Mr. McCarthy for.

Now, this was the year after the accident. This was after the surgery, and Mr. McCarthy is at home, and his wife was at home. The release is not a blank sheet of paper. You will be shown the release, and you may read it, but we won't read it at this point. But it is a release, and it says at the top, General Release.

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15 Now, we have at this time no claim of any fraud, and we do not have thereafter any claim for fraud in obtaining this release until April of 1963 when he filed

suit against Mrs. Cahill. The fraud, if it were a fraud, obviously had to be known before then.

No claim was ever made to the insurance company. It is pointed out to you that when Mr. McCarthy went to the insurance company to get the rest of his claim, as he thought, he was turned down.

What that amounts to is when he filed suit, a year and a half after signing the release, he was told that he had released the claim, and at the time never wanted to make claim, and that they were not going to pay him.

When all this evidence has been shown to you, ladies and gentlemen, we will expect that you will bring in a verdict for the defendant. Thank you very much.

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20 **Dr. Robert C. Rush**

was called as a witness by the plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

• • • • • • • • • •

21 Mr. Murphy: Your Honor, I am going to stipulate Dr. Rush is eminently qualified.

• • • • • • • • • •

22 Q. Doctor, did you have occasion to see Mr. Jeremiah J. McCarthy professionally or about December 23d, 1960? A. Yes, sir.

Q. Where did you see him on that date? A. Georgetown University Hospital.

Q. What history did he give you at that time of any then present complaints? A. He had suffered a fall, injuring his left shoulder, on the same date, while at work.

Q. Now, were x-rays taken at that time in Georgetown Hospital? A. Yes, sir.

Q. Did you review those x-rays? A. Yes, sir.

Q. What did they show? A. They showed a markedly comminuted, that is, a fragmentary type fracture of the

left humeral head and neck, which is the shoulder, the upper arm bone extending into the shoulder.

Q. After that history and reviewing the x-rays that were taken, what was your then course of treatment, Doctor? A. He was taken to the Operating Room, where
23 under anesthesia the fracture was manipulated, that is, put back into position, into the best possible position, and a plaster cast was applied.

Q. You say under anesthesia. Was that local or general? A. A general anesthesia.

Q. In other words, he was put out cold? A. Yes, sir.

Q. Doctor, what kind of cast did you apply? A. He had a cast incorporating his body, and trunk, from the wast up, and the left upper extremity, the left arm.

Q. How far down the left arm did the cast go? A. To the base of the fingers.

Q. Doctor, how long did he wear that cast to your personal knowledge? A. Until January 30th, 1961.

Q. That is a little better than five and a half weeks? A. Yes, sir.

Q. During the early part of January, did you have occasion to re-x-ray him? A. Yes, sir.

Q. What did the subsequent x-ray show? A. They showed the position of the fracture was satisfactory for the type of fracture it was.

Q. On or about January 10th, what did you do? A. On January 10th, a circulation check was made, and
24 the circulation of the hand was found to be satisfactory.

Q. Did you take any further circulation checks? A. Well, they were made on January 3rd and January 10th and January 17th.

Q. Now, after you removed the cast, after he had worn it approximately five and a half weeks, what did you do? A. At that time he was fitted first with a sling, to attempt his own regaining of motion, and on February 17th, 1961,

he was started with physical therapy in the office in the form of heat and stretching and exercise.

Q. What was the condition of his left upper extremity on February 17th as to this motion? A. There was marked limitation of motion.

Q. Marked limitation? A. Yes.

Q. Did there come a time, Doctor, when you had to admit him formally as an in-patient at Georgetown Hospital? A. Yes, sir.

Q. When was that? A. That was March 30th, 1961.

Q. What was the purpose of that admission? A. To again put him under anesthesia and attempt to break up adhesions, which might have formed about the shoulder joint itself.

Q. How long was he in the hospital at that time on March 30th? A. Just a few days.

Q. After his discharge from the hospital, what course of treatment did you then institute? A. He was again returned to physical therapy in the office.

Q. Give us the date he received physical therapy in the office? A. After March 30th, on April 3d, and April 6th, 1961.

Q. When did you see him last, Doctor, professionally? A. On November 1st, 1961.

Q. What condition did you find at that time as to these injuries? A. He was still unable to elevate or abduct the arm at right angles, that motion, and he was unable to flex the shoulder at right angle, this motion, and rotational motions were also slightly limited.

Q. At that time did you make any rating of any permanent partial disability of the left upper extremity? A. Yes, he was rated at 15 per cent permanent partial disability of the left upper extremity.

Q. Have you seen him since November 1st, 1961, professionally? A. No, sir.

Q. Doctor, what was your total charge for pro-
26 fessional services rendered in the treatment of this patient? A. $210.00.

Q. Is that a fair and reasonable charge for the amount and type of services rendered? A. I believe so.

. . . . . .

Dr. Allan McKelvie

was called as a witness by the plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Davis:

. . . . . .

27 Q. When did you first see him?
28 The Witness: I first examined Mr. McCarthy in consultation on April 25th, 1962.

. . . . . .

29 Q. What did you find with reference to his left upper extremity? A. Part of my findings were concerned with comparing the left upper extremity with the right. Part of my findings were concerned with the changes that had taken place in his left shoulder compared with the right, and we had to tell how long these changes had been there in order to arrive at an opinion, which we thought might be helpful, and a significant part in our examination had to be his telling us that he had no trouble with his shoulder prior to a certain date.

Q. What date was that? A. He dated the onset specifically to December 23d, 1960, and we examined him in April of 1962.

Q. In connection with your examination, did you
30 review x-rays that had been made in connection with his injury? A. I had an opportunity to review previous x-rays made of his left shoulder, and in addition we took x-rays in our own office that day of his left shoulder.

Q. In other words, you took x-rays yourself in connection with the examination? A. Yes, sir.

Q. What difference, if any, Doctor, was shown in the x-rays made in 1962 and those made in 1960? A. There was quite a difference from the initial x-rays made at Georgetown Hospital and reviewed by myself in 1962, and these x-rays which were dated December 23d, 1960, showed a severe disruption of the head of the left humerus or left arm bone.

And subsequent x-rays showed healing had taken place between the various fragments of the humeral head and the healing in my opinion had taken place with persistent displacement of the fragments. These were the main, significant differences between the initial x-rays and the one taken in my office in April, 1962.

Q. Doctor, did any of these x-rays indicate what is known medically as a luxation of the left shoulder? A. The term which I think I just used was disruption, and the word luxation could be applied, the word luxation meaning a separation of the two parts of the joint, and I
31 certainly feel in my opinion there was a luxation of the shoulder joint, and I believe in my own description I said that there was persistent deformity of the humeral head, more particularly an upward displacement of a fragment of the greater tuberosity, that is one of the parts of the ball part of the ball and socket joint.

My most significant finding in the course of my examination that day was a gross loss of movement in the left arm or left shoulder compared with the right. That was in 1962.

And his complaints at that time were, of course, his loss of power and strength in gripping ability.

Q. I believe you stated, Doctor, that these x-rays taken at Georgetown in 1960 actually showed two fractures; is that true? A. It showed he had suffered a very severe fracture of the humeral head, and separation of the greater and lesser tuberosity of the humerus as one factor, and a

second fracture extending through the region of the anatomical neck of the humerus, with some displacement.

In other words, in lay terms, this meant the ball part, the ball and socket had been completely disrupted, and no longer remained in the contour of a ball, but it was in irregular shape with two major fragments of this.

This is a rather unusual type of fracture, we don't see it very often, and it is almost to be described as a
32 kind of explosive fracture of the humeral head itself.

Q. Doctor, after reviewing the original x-rays and taking your own in 1962, what was your diagnosis? A. My diagnosis was a mechanical disruption of the function of the left shoulder joint, a post-traumatic arthritis of the left shoulder joint and marked limitation of motion of the left shoulder joint.

Q. At that time did you render any opinion as to any permanent partial disability of the left upper extremity? A. Taking into account the lost motion, and taking into account the marked disruption in the actual appearance of the left shoulder, and taking into account the wasting and loss of power in the muscles around the left shoulder, we arrived at a conclusion at that time that the cause of these changes from the normal, comparing the left with the right, that he had a 30 per cent permanent partial disability of the left upper extremity in April, 1962.

Q. Doctor, have you had occasion to see and examine Mr. McCarthy since April 25th, 1962? A. I had the opportunity of examining him once again recently on the 8th of November, 1965.

Q. That is two and a half years after the original examination approximately? A. Yes, sir.

Q. What did you find on that occasion, Doctor, in
33 November of this year, just this month? A. We elicited carefully at the time of our initial examination the range of motion in the left shoulder joint compared with the right, and we again inquired of his difficulties on

our recent examination, and we compared the range of motion at this time with that we found in April, 1962, and we found that there was a further loss of motion in the left shoulder.

Q. Have you made any change in your original rating of permanency of 30 per cent as a result of this last examination? A. With the passage of time and the failure to regain that motion, and his continued weakness in the left arm, and the further increase in disability or further loss of movement, and the fact that his x-ray showed further osteo porosis, that is, thinning of the bone, due probably to disfunction or lack of function, we felt that he now had a 10 per cent additional increase in disability, and I estimated it on the 8th of November as being 40 per cent permanent partial disability of function of his left upper extremity.

Q. Doctor, what was your total charge for these two orthopedic evaluations and examinations? A. I have a bill here which is outstanding in the amount of $50.00, and I see that $45.00, and $4.50, have been paid in part, so I believe the total bill would be $95.00.

Q. Is that a fair and reasonable charge for the type of services you rendered for the examination and
34 evaluation of Mr. McCarthy? A. I believe these charges are fair and compatible with those made in this area, yes.

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40 **Jeremiah J. McCarthy**

one of the plaintiffs herein, was called as a witness in his own behalf and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Davis:

Q. Mr. McCarthy, will you state your full name to the Court and jury? A. Jeremiah J. McCarthy.

Q. Will you give us your age at the present time? A. 59, next month.

Q. What was your birth date? A. December 28th.

Q. What year? A. 1906.

Q. Where do you live, Mr. McCarthy? A. 4549 MacArthur Boulevard.

Q. What is your occupation? A. Electronic engineer.

41 Q. With what company are you affiliated? A. McCarthy Manufacturing Company.

Q. Is that a corporation? A. Yes, sir.

Q. Are you an officer of that corporation? A. Yes, sir.

Q. What is your office? A. President.

Q. President? A. Yes, sir.

Q. Now, were you in that business in December of 1960? A. Yes, sir.

Q. Do you know the defendant in this case, Mrs. Florence M. Cahill? A. Yes, sir.

Q. How long have you known her? A. Oh, she is a member of our parish, Our Lady of Victory Church, and I have known her a number of years, I would say 10 or 12 years, maybe 14 years.

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42 Q. Now, what was the occasion of your visit to Mrs. Cahill's home on December 23rd, 1960? A. She asked me to deliver an FM radio, and I did that on December 23rd, and I delivered it upstairs, the maid admitted me, and I gave her the radio, and she gave me a check for it, and on the way down, she was up, and I wished her a Merry Christmas, and I started down,

43 and when I hit the bottom of the steps, there was a scatter rug there and it slipped out from under me.

Q. About what was the dimensions of this scatter rug? A. 30 by 40 inches approximately.

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47 Q. Did anyone see you or call on you with reference to this injury on or about December 30th, 1960,
48 about a week later? A. Mr. Antoniacci.

Q. Is that the young man who was in here this morning? A. Yes, sir.

Q. At that time were you wearing this cast? A. Yes, sir.

Q. What conversation did you have with him on the first visit as to your injury? A. Well, he wanted to know. I told him I had known Mrs. Cahill for a number of years, and he said that he was a Catholic, we were all Catholics, and get along fine, and he said that everything would be taken care of.

Q. Then you continued under Dr. Rush's care as he described this morning; is that correct? A. Yes, sir.

Q. You last saw him on November 1, 1961?

* * * * * * * * * *

Q. At that time, Mr. McCarthy, you had a claim for Workmen's Compensation pending, did you not, with
49 the Department of Labor? A. Yes, sir.

Q. And what was the name of your own insurance carrier? A. It was National Surety Company.

Q. National Surety Corporation? A. Yes, sir.

Q. And as a result of that Workmen's Compensation claim, had your medical expenses and hospital expenses been paid? A. Yes, sir.

Q. Were you also paid a portion of Workmen's Compensation on your salary? A. Yes, sir.

Q. What was your salary at that time? A. $140 a week.

Q. And under the compensation law, you were only paid a portion of your actual loss; is that true? A. Yes, sir.

Mr. Davis: If Your Honor please, I would like to read into evidence as Exhibit 12 a letter from Mr. Kevin M. Snead, Senior Claims Representative of the National Surety Corporation.

The Court: Is there any objection?
Mr. Murphy: No, Your Honor.

(The document previously marked for identification as Plaintiff's Exhibit No. 12 was received in evidence.)

* * * * * * * * * *

50 Q. Now, Mr. McCarthy, during the pendency of your Workmen's Compensation claim, did you receive a notice on or about August 1, 1962, of an informal conference? A. I believe, sir, it was Mr. Ferone asked me that.

Q. Frank L. Ferone? A. Yes.

* * * * * * * * * *

Q. Now, after receiving that notice, Mr. McCarthy, did you receive another notice from the law firm repre-
51 senting National Surety Corporation? A. I don't remember that. I think I did.

Q. I will show you this letter and its attachment and ask you if you can identify that?

The Court: Has it been marked?

Mr. Davis: No, I will get a number on it, Your Honor.

The Witness: Yes, sir, I remember that now.

Mr. Davis: That is a letter dated September 19th, 1962, with a photostatic copy dated September 7th, 1962.

Will you identify this as Plaintiff's Exhibits 14 and 14-A?

(The documents referred to were marked Plaintiff's Exhibits No. 14 and 14-A for identification.)

Mr. Davis: I offer this in evidence, Your Honor.
Mr. Murphy: I have no objection.

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Q. Now, Mr. McCarthy, as a result of these payments made on the hospital bill, Dr. Rush's bill, and Dr.
52 Diley's x-rays, were those payments made by the National Surety Corporation pursuant to any award?

A. Yes, sir, they were made—

Q. I mean, was there a formal award? A. No, there was no award.

Q. That was the purpose of the August conference? A. That is right, sir.

Q. Now, going back, Mr. McCarthy, to December 20th, 1960, were you visited on that day by Mr. Gene Antoniacci, Claims Investigator or Claims Examiner for the Phoenix Group?

* * * * * * * * * *

By Mr. Davis:

Q. Were you visited by Mr. Antoniacci? A. Yes, sir.

Q. That was on what date? A. December 20th.

Q. '61? A. '61.

Q. And you recognized him from the prior visit a year before, did you not? A. Yes, sir.

Q. Will you tell the Court and jury the entire
53 conversation between you and Mr. Antoniacci on that occasion? A. He was very friendly. He said that he appreciated the way I had been about the whole thing, we were all Catholics, and we got talking about the Knights of Columbus, and he knew I was a member of the Knights of Columbus, and he said that he wanted to do something.

He said I hadn't asked for anything, and he said he wanted to do something.

I said I didn't want to make a claim, I knew Mrs. Cahill.

He said, Well, I don't want this to be this way, we will pay you for your medicine and parking lot and so forth, and he said, I will give you a receipt.

Q. Did he ask you if you kept a record of your medicine? A. Yes, sir, he did. I gave him those receipts.

Q. Was that in a sheaf of receipts? A. Yes, sir, I went and got them, I had them in the drawer.

Q. What did they actually total? A. About $85.00, as far as I recall.

Q. When you showed those to Mr. Antoniacci, what did he say at that time? A. He said, Oh, let me make it $135.00.

He said, Sign this receipt for me, that is all.

My wife was there, and he was friendly.

54 Q. Who else was present? A. My wife and my daughter.

Well, any way, I told him I thought that was nice of them, so then at this time, he said, Well, just sign this, I don't have a check with me today, but I will send you one, and then he brought me this folded slip, and said: Just sign here for your receipt.

Mr. Davis: May I see Exhibit No. 1, please, Defendant's Exhibit No. 1?

By Mr. Davis:

Q. I show you what has been identified and received in evidence as Defendant's Exhibit No. 1. Is this your signature at the bottom of it? A. Yes, sir.

Q. And your wife's below it? A. Yes.

Q. Now, take that paper and show the jury how it was handed to you. A. This way (indicating).

Sign here. This will be the receipt, your receipt for this.

I signed it on my knee.

The Court: All right, you may resume the stand.

By Mr. Davis:

Q. In other words, he held the paper so you

55 could not see any heading at the top of it; is that right? A. Yes, sir, and he held it on my knee while I signed it and he said to my wife, you sign this too.

Q. Did he ever tell you that was a release? A. No, he said it was a receipt.

Q. He said it was a receipt? A. That is the word he called it.

Q. Now, on that occasion, December 20th, 1961, did you

actually receive anything for your signing this paper? A. No, sir.

Q. What did he tell you as to not having certain equipment with him? A. He said he didn't have the proper check, but I will send you one, you will get it the next day or so.

Q. What else happened on that occasion? A. Well, it was around Christmas, we were wrapping Christmas presents in the other room, and I told my daughter to bring in a bottle to give him, and she gave him a bottle of Old Crow.

Q. Of Old Crow Bourbon Whisky? A. Yes, sir.

Q. Did he accept it? A. Yes, sir.

* * * * * * * * * *

56 Q. Mr. McCarthy, I think just prior to the luncheon recess we had gotten to the point that Mr. Antoniacci made a second visit to your home; is that right? A. Yes, sir.

Q. And after signing Defendant's Exhibit No. 1, the purported release, you say that you then gave as a Christmas present to Mr. Antoniacci a bottle of Old Crow Bourbon; is that right? A. Yes, sir.

Q. Did he accept it? A. Yes, sir.

Q. Now, when did you next have occasion to contact the firm of Ellett & Short, the insurance firm? A. Really the next contact with them was around when we had the compensation conference.

Q. According to one of your exhibits that would
57 be in August, 1962? A. Yes, sir.

Q. Now, who did you talk to at Ellett & Short in August, 1962? A. Just the attorney, Mr. Ferone, who was representing the Comp., and I didn't have any attorney with me at that time, and they had two lawyers there.

Q. What was said to you at that time by the representatives of Ellett & Short? A. Well, that was later on, they sent me that letter, that on account of this release, that

they weren't responsible for any compensation further.

Mr. Murphy: Your Honor, I don't think this is an answer to the question.

The Court: Well, does this have any bearing on the matter?

Mr. Davis: I want to bring out when he first knew that this was an alleged release.

The Witness: It was really in August, 1962.

By Mr. Davis:

Q. What was the purpose of going to Ellett & Short on that occasion? A. Well, Mr. Ferone called me and told me that we should have a conference on the compensation, and I went down there, and they had the other two lawyers there, and I didn't have any representative
58 there.

Q. You are talking about the conference.

My question was, What was your purpose in going to Ellett & Short in August, 1962?

Mr. Murphy: I object, Your Honor, leading.

The Court: If you object on the ground it is leading, I might consider the objection.

Mr. Murphy: Yes, sir.

The Court: All right, rephrase the question.

By Mr. Davis:

Q. My question originally was, Mr. McCarthy: When did you next have occasion to contact the firm of Ellett & Short in the Investment Building? A. Well, that must have been the compensation hearing, that is all, the last I heard after this visit in December.

Q. Was that the first time that you were informed that they were regarding this as a release? A. Yes, sir.

Q. As a result of the informal conference in Mr. Ferone's office, was there ever any award made to you on the basis of a permanent partial disability? A. No, sir.

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60 Cross Examination

By Mr. Murphy:

Q. Mr. McCarthy, do you recall when it was Mr. Antoniacci first contacted you? A. It was approximately a
61 week after the accident. It was in that week.

Q. Were you also contacted by someone representing your Workmen's Compensation insurance carrier? A. We reported that ourselves, and we were contacted, yes, sir.

Q. With whom did you discuss the Workmen's Compensation aspect of it? A. As far as I know, sir, it was Mr. Bombara.

Q. Mr. Bombara came to your home or did you go to his office? A. No; we talked over the phone.

Q. Did Mr. Bombara ask you about your fall, how it occurred? A. Yes, sir.

Q. Did you tell Mr. Bombara about Mrs. Cahill saying that she should not have had the scatter rug there? A. Yes, sir, I did.

Q. Did you tell Mr. Bombara that Mrs. Cahill had said that the floor had been waxed that day? A. Yes, sir.

Q. Did you also tell this to Mr. Antoniacci? A. Yes, sir.

Q. At the time you first conversed with Mr. Antoniacci, did you do anything other than talk about the situation? A. No, we just—he told me that he knew we were
62 friends, the Cahills and myself, and it was on a friendly basis.

Q. You did know Mr. Antoniacci was representing the insurance carrier of Mrs. Cahill in case you made a claim against her? A. I should have realized that, sir.

Q. Well, you did realize it, didn't you, Mr. McCarthy? A. I should have, yes, sir. In fact, we were very friendly. It was friendship more than it was any antagonism.

Q. That realization wouldn't necessarily cause antagonism, Mr. McCarthy, but I would like you to answer, you did realize Mr. Antoniacci was representing Mrs. Cahill's

insurance company? A. Yes, sir, I knew he was representing her, yes, sir.

Q. And that he would have to be the one who would have to discuss and negotiate with you if you made a claim? A. Yes, sir.

Q. Did you tell Mr. Antoniacci at the first meeting that you didn't intend to make a claim against Mrs. Cahill? A. I said I didn't want to, no.

Q. Did you tell him that you did not intend to? A. I said I did not want to, that is what I told him.

Q. Did you sign a written statement for Mr. Antoniacci as to how the accident occurred, what you remember of it? A. Not that I remember, no, sir.

Mr. Murphy: May I have this marked as Defendant's Exhibit 2 for identification?

63 (The document referred to was marked Defendant's Exhibit No. 2 for identification.)

By Mr. Murphy:

Q. Now, Mr. McCarthy, did you ever sign a written statement for Mr. Antoniacci with regard to how this accident happened? A. I don't remember signing it, sir.

Q. I show you what has been identified as Defendant's Exhibit No. 2 for identification and ask you whether you recall seeing that piece of paper? A. He wrote this out, yes, sir, and I signed it.

Q. And that is your signature at the bottom? A. He wrote it out.

Mr. Davis: Is that dated, Mr. Murphy?

Mr. Murphy: Yes, January 12th, 1961.

Q. Does that refresh your recollection one way or the other whether or not on January 12th was the first time you saw Mr. Antoniacci or was it a subsequent occasion? A. This must have been the date, if he had that date there. That was my signature.

Q. Prior to the occasion when this piece of paper was

put in your hands and signed, did you see Mr. Antoniacci again? A. Prior?

Q. In the period between signing this statement
64 and the time you signed the release? A. No, he called. I am positive he called but I never saw him personally.

Q. He called on various occasions to see what the situation was? A. Yes, sir.

Q. Did you on any of those occasions tell Mr. Antoniacci that you did not want or did not intend to make a claim against Mrs. Cahill? A. At that time I had no feelings towards anything. I felt it was too much of a friendship.

Q. Do you remember ever signing a written statement for your compensation carrier or insurance company as to how this accident happened? A. I don't really remember that, sir. I may have, but I can't give you a definite date on that.

Q. Now, on this particular evening which resulted in the signing of this paper, do you recall what time of day it was that Mr. Antoniacci—

Mr. Davis: May we have for the record, what paper he is talking about?

The Court: Is that Defendant's Exhibit No. 2?

Mr. Murphy: I am trying to be delicate, without referring to it as a release, but it is Defendant's No. 1, is it not, the release.

Defendant's Exhibit No. 1, which you have testi-
65 fied was folded over?

The Witness: Is that the December 20th paper?

By Mr. Murphy:

Q. Yes, sir. Do you recall what time of day that was? A. It was around noon.

Q. And you were at home? A. Yes, sir. My office is right across the street and I was home for lunch.

Q. Did you discuss at that time whether you would make a claim against Mrs. Cahill? A. No, he just brought up,

he said, You have been so nice about this whole thing, we would like to do something for you.

He said, You haven't asked for anything, and we got discussing, and I said Periodically my right eyes goes blind since the accident, and he said, Oh, that is funny, I have been blind myself, this whole summer, and I know what you have been going through, and he brought up blindness, and we talked friendly all the way.

Q. You were still in the mood that you did not want to make a claim against Mrs. Cahill? A. That is right, sir.

Q. Mr. Antoniacci told you that he would like to take care of the expenses which you had not previously had paid for by your compensation? A. Medicine and
66 parking lot and so forth, and he said, I will give you that and sign this receipt.

Q. And this receipt when it was presented to you, was it a single piece of paper or a double sheet of paper? A. As far as I recollect it was a single sheet of paper.

Q. There were no carbons under it? A. No, sir, not that I know of. It was a folded sheet.

Q. Will you fold it again, the way it was folded over when it was presented to you? A. Like this(indicating). That is the way, that is as far as it was as I recollect it.

Q. Will you read to the ladies and gentlemen of the jury what you saw when it was handed to you?

Mr. Davis: Your Honor, he didn't read it at all.

The Court: Well, the jury will remember what he said.

The Witness: I didn't read anything. I just signed the thing. It was stupid. I see where it says, Caution, read before signing. I thought it was a receipt.

By Mr. Murphy:

Q. Read the whole thing that you see there. A. It says: Witness my hand and seal this 20th day of December, 1961.

Witness Antoniacci, and I signed it and my wife signed it.

67 Q. You signed it immediately under what in print? A. Where it says: Caution, read before signing.

Q. Now, you conduct a business, do you not, Mr. McCarthy? A. Yes, sir.

Q. And you are used to signing contracts? A. Yes, sir, but I get caught periodically. I trust people; I have great faith in people.

Q. But you have previously been caught in business by not reading contracts that you were supposed to sign? A. Oh, well, not too much.

Q. As a general rule in business, you read your contracts, do you not? A. Many, many times either the lawyer tells me to sign it, or I take his word for it.

Q. This is true with customers that you deal with year after year, you read the contracts? A. I don't read every contract, no, sir.

Q. But you never met Mr. Antoniacci before this accident? A. No, sir. He said that he was of the same religion, he was a good Catholic, and he said he knows I am interested in the Knights of Columbus, and it was friendly.

Q. When did you discover the paper was blank at the time? A. Sir, when I found out it was a release, it was at the hearing in August.

68 Q. Do you recall, Mr. McCarthy, your counsel saying what he intended to prove in your behalf, that he intended to prove that the release was blank when you signed it? A. Yes, sir.

Q. When did you discover that it was blank when you signed it? A. As I told you, I found I signed a release instead of a receipt.

Q. When did you discover it was blank when you signed it? A. The only time I discovered that was when they told me at the Comp. hearing it was a release.

Q. But at that time it was filled in, wasn't it, Mr. McCarthy? A. Yes.

Q. When did you discover that it was blank?

The Court: Did he say it was blank or his lawyer said it was blank?

Rephrase the question.

By Mr. Murphy:

Q. Do you disagree with Mr. Davis' statement on opening statement? A. No, I don't disagree.

Q. You agree with his statement that it was blank
69 when you signed it? A. Yes, sir.

Q. And when did you discover that it was blank when you signed it? A. As I told you, the only thing I discovered that I had signed a release was at the compensation hearing in August.

Q. Mr. McCarthy, we know that in August you discovered that you had signed a release, but at that time it wasn't blank, was it? A. No, sir.

Q. When did you discover it? A. I never saw that release until today. I never had a copy of it or anything.

Q. Did you ever tell Mr. Davis that it was blank when you signed it? A. As far as I recollect, I just told him I never signed a release, period. I signed a receipt.

Q. In what form was it when your wife signed it? A. Just as you presented it and showed it to me.

Q. Folded over in the same manner? A. Yes, sir.

Q. Did you hand it to her? A. No, she came over and signed it, too.

He brought it over and I signed it.

70 Q. On your knee? A. Yes, sir.

Q. Where was your daughter at the time of the signing of the paper? A. We have an archway between the living room and the dining room, and my daughter was sitting in the dining room at the table, and she could hear the conversation, and she brought the liquor into him.

Q. Now, at this point I understand your testimony to be that you didn't think that the relationship between you and Mr. Antoniacci was at an end? A. As far as I was con-

cerned, I figured that it hadn't affected the claim, it was a receipt for the medicine, as he said it was. He did stress that it was just medicine and parking and so forth. He said that is not anything but a receipt.

Q. Then at that time you still felt Mr. Antoniacci was representing someone against whom you might some day make a claim? A. I had no feelings in that regard, sir.

Q. You didn't have any idea you would ever make a claim? A. Not at that time, no, sir.

I didn't think it was affecting my claim. I never realized it would affect the compensation, that they wouldn't do anything about my shoulder later on.

Q. Mr. McCarthy, all I want to know, at that point
71 had you any conception of making a claim against Mrs. Cahill? A. No, sir. Only I said, This wouldn't affect my shoulder later on, this won't affect anything?

He said, Positively not. It would affect it, as far as your shoulder is concerned, it won't affect it.

Q. It was the shoulder you were talking about? A. Yes, sir, because I had been in a cast and had therapy.

Q. When you discussed this claim, what claim are you talking about? A. I am talking about the compensation claim. I never felt it would affect that claim.

Q. As far as Mrs. Cahill and her representative, you at that point didn't want to make any claim? A. Not against Mrs. Cahill, no. To this day, she is still a friend.

Q. This is evidenced then in your mind this was at an end as far as Mrs. Cahill was concerned and Mr. Antoniacci— A. I had no idea it would affect the compensation, absolutely, I didn't have any idea.

Q. I understand that, Mr. McCarthy.

But Mr. Antoniacci represents Mrs. Cahill? A. Yes, sir.

Q. And Mr. Bombara represented the insurance carrier you pay your insurance as the Comp. carrier? A. Yes.

72 Q. And we are talking about the claim that Mr. Antoniacci, that he was representing? A. Yes. But

I had no idea that his receipt would affect my compensation, and it was getting worse periodically.

Q. As far as the relationship of Mr. Antoniacci was concerned, you were satisfied at that point it was at an end, because you offered him a bottle of whisky, didn't you? A. Gave him a present, yes, sir.

Q. Being an honorable man, you would not offer a fellow whisky that you at one time in the future expected to negotiate a claim with?

Mr. Davis: I object to this as argumentative, Your Honor.

The Court: I think it is argumentative.

By Mr. Murphy:

Q. Mr. McCarthy, you did offer this gentleman a bottle of whisky?

The Court: I think he testified to that. He said he gave it to him.

By Mr. Murphy:

Q. Up to this point you believed that Mr. Antoniacci was representing Mrs. Cahill and against whom you might be able to make a claim? A. My feeling is that he was a very honorable man.

Q. Then after signing this paper you offered Mr.
73 Antoniacci a bottle of whisky? A. Yes, sir. It was Christmas.

Q. You did? A. Yes, sir.

Q. Now, on this occasion when you went to Mr. Peroni's office, that wasn't at Ellett & Short? A. It was at Fifteenth Street, Northwest, and M.

Q. And that was at the Workmen's Compensation Commission? A. Yes, sir.

Q. And these lawyers who were present, they didn't represent Ellett & Short, did they? A. I don't know who they represented.

Q. Did you ask them? A. Mr. Peroni said he would be

representing me more or less, and that is why I didn't take an attorney with me.

Q. Incidentally, did Mr. Antoniacci leave you a copy of the release or paper which you signed? A. No, sir, I don't have a copy of that, no, sir.

Q. When did you get the check? A. About two days later.

Q. Did you examine the check when you endorsed it? A. I endorsed it, and it was $135.00.

Q. I show you what has been marked for identification and is in evidence as Defendant's Exhibit No. 1-A, which is a photocopy of a draft.

74 Is that your signature? A. Yes, sir.

Mr. Murphy: May I read at this time what appears above it to the jury, Your Honor?

The Court: Yes.

Mr. Murphy: Above the signature which Mr. McCarthy has just identified appears the printing, This draft must be endorsed by payee, personally, and such endorsement shall constitute a release in full for the account shown on the reverse side.

On the reverse side it says: Payment of, and it is typed in, Claim for injuries sustained on 12-23-60.

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Q. Mr. McCarthy, was this draft addressed to your home address or was it addressed to your business address? A. To my home, sir.

Q. Did you open the mail in which it came or did your wife have it open and present the check? A. I don't know. I could not give you a definite statement on that.

Q. You don't recall whether your wife presented the check to you or you presented it to your wife? A. No, sir.

Q. Would the fact that your signature appears

75 above your wife's have any effect of recollection? A. I wouldn't have any recollection, no, sir.

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Q. Now, on this occasion in Mr. Peroni's office, were you shown a copy of the release at that time? A. No, sir.

Q. You were just told that there was a release? A. Yes, sir.

Q. Did Mr. Peroni ask the attorneys who were there to present this release upon which they were relying? A. No, sir, he didn't.

Q. Did Mr. Peroni tell you at that time whether he could not go on with the proceeding or it was at an end? A. He didn't make any statement at that time.

Q. What did you then do after the hearing, did you contact a lawyer? A. What I did, Mr. Peroni suggested that I contact some other doctor and get another doctor, and that is when I consulted Dr. McKelvie because I have known him.

Q. Mr. Peroni suggested that you go to another doctor? A. Just consult another doctor, that is all.

He didn't mention any doctor. He just said, Consult another doctor.

76 Q. When did you first consult Dr. McKelvie? A. In April, sir.

Q. That will be April of the year before or after the hearing? A. After.

Q. You had the hearing then on what date? A. It was around August, around the 20th, or 24th of August.

Q. 1962? A. As far as I know.

Q. Dr. McKelvie, you saw him in April, 1962, did you not? A. I don't remember the date, sir.

Q. Do you remember Dr. McKelvie testifying? A. Yes, I do.

Q. Do you remember what he said his record showed the date you first contacted him? A. Well—

Mr. Davis: I will stipulate it was April 25th, 1962.

The Court: Is there any dispute about the date?

Mr. Murphy: No, I don't believe so. There should not be.

The Court: Do you stipulate it was in April?

Mr. Davis: April 25th, Your Honor.

The Court: That the plaintiff saw Dr. McKelvie, April 25th, 1962?

77 Mr. Davis: Yes, sir.

By Mr. Murphy:

Q. Mr. McCarthy, with this understanding then that the record shows that you saw Dr. McKelvie four months before the hearing in Mr. Peroni's office, does this refresh your recollection as to how you got to Dr. McKelvie? A. Yes, sir, it was suggested to me that I consult another doctor.

Q. But not by Mr. Peroni? A. As far as I know, Mr. Peroni, yes, sir.

Q. When? A. I talked to him in March.

Q. In March? A. Yes, and the hearing was in April.

Q. Was it by telephone? A. By telephone, yes, sir.

Q. Maybe we are confusing one another, Mr. McCarthy. As I understand it now, you talked to Mr. Peroni by telephone in March, and you went to see Dr. McKelvie in April, and the hearing was in August, not in April?

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79 Q. In any event, getting back to the hearing in Mr. Peroni's office in August, 1962, what did you do thereafter? A. What do you mean?

Q. Well, this is where we get to Dr. McKelvie, and originally you said you went to see him after the hearing because Mr. Peroni told you to. A. Well, it wasn't after the hearing, it was after the telephone call, when we were talking on the phone.

Q. Now, we are back to the hearing.

What did you do as a result of the hearing, did you go to see a physician at that time or go to see a lawyer or what? A. I seen no doctor at that time, no sir.

Q. Did you consult a lawyer? A. The first lawyer I consulted was Mr. Davis.

Q. When did you consult Mr. Davis? A. It would be in—I can look it up.

Mr. Davis: If it makes it clear, Mr. Murphy, I will stipulate it was February 16th, 1963.

The Court: Do you agree to that, February 16th, 1963?

Mr. Murphy: I will accept what Mr. Davis says.

The Court: All right, it has been stipulated that the plaintiff saw Mr. Davis on February 16th, 1963.

Mr. Davis: That is correct.

80 By Mr. Murphy:

Q. What history of your fall did you give Mr. Davis at that time? A. I told him what had happened. I will tell you the same thing.

Q. I would like you to tell me what you told him.

The Court: Do we have to get into what he told Mr. Davis? I take it he saw him as his attorney, didn't he?

If you have anything in the nature of impeaching testimony or want to show that he said something different on the stand than what he told Mr. Davis, I will permit you to show that.

By Mr. Murphy:

Q. Well, specifically, Mr. McCarthy, what did you tell Mr. Davis with regard to the piece of paper you had signed? A. I told him it was just a receipt, I signed a receipt for the medicines and the parking, and that part of it.

Q. And you told him it was not a release? A. Definitely, yes, sir.

Q. When were you informed it was a release? A. As I told you, the first time I was informed was at the hearing, in the Compensation hearing, when they told me they would not do any more for me because I signed a release, and it affected my compensation.

Q. At that time apparently you went to see Mr.
81 Davis and told him it was a receipt that you had signed? A. Yes, sir.

Q. So at that time you didn't believe what Mr. Peroni had told you that it was a release? A. Mr. Peroni didn't say very much, just what I told you he said. He was impartial at the hearing.

Q. And he told you you had signed a release, didn't he? A. Well, they walked in, the two lawyers, and went out in the corridor and discussed this, and came back after this meeting, and they said, We won't do anything further, you signed a release.

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82 The Court: Well, repeat it once more.

When did you first find out that you had signed a release?

The Witness: It was at the Compensation hearing.

The Court: That is in August, 1962?

The Witness: Yes, sir.

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By Mr. Murphy:

Q. Did you tell Mr. Davis you had signed a release? A. I told Mr. Davis I signed a receipt.

Q. With Mr. Antoniacci? A. Yes, sir.

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83 By Mr. Murphy:

Q. At the time that you were talking to Mr. Davis and you said you had signed a receipt, when you were talking to Mr. Davis did you tell him that you signed a receipt and that the other people were claiming that there was another piece of paper that was a release? A. I didn't get your question. I don't understand your question, sir.

Q. Well, when Mr. Peroni was at the hearing, you were told a release had been signed? A. Yes, sir.

Q. At that point did you connect it in your mind with what you had signed for Mr. Antoniacci? A. That is the only paper that I had signed as far as I was concerned.

Q. Well, therefore, when you first conferred with Mr. Davis, you told him when I signed that I thought it was a receipt but I was told it was a release? A. That it was a release, yes, sir.

Q. Did you ever ask for a formal hearing on the Compensation claim? A. Just the one hearing I went through, is the one in August.

Q. Did you ever ask for a formal hearing on the Compensation claim? A. No, sir.

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Mr. Davis: Your Honor, I am inquiring of defense counsel if he is offering in evidence what has been identified as D-2.

The Court: Are you offering that at this time?

Mr. Murphy: No, Your Honor, but I might if I can inquire of the Court for a legal ruling on this.

The Court: What is D-2?

Mr. Murphy: This is the signed statement he signed on January 12th.

The Court: Well, I don't know the purpose of it.

Mr. Davis: If he is not going to, I will.

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Mr. Davis: Well, since he did not choose to offer it, I will offer it as a plaintiff's exhibit.

The Court: Do you object to it?

Mr. Murphy: No, Your Honor, but in view of Mr. Davis' statement in open Court, may I ask the witness a couple of more questions about it?

The Court: Yes.

Now, you see, if there is anything in that statement that you have, which was written down apparently by your client, by the representative of the insurance company, that you feel impeaches the witness, then I want to give a cautionary instruction to the jury as to the purpose for which they can receive that evidence.

Mr. Murphy: I do so intend.

The Court: Do you wish to try to impeach him now on some of the testimony?

Mr. Murphy: Yes, Your Honor.

The Court: Well, ask the question first.

By Mr. Murphy:

Q. Mr. McCarthy, do you recall testifying that Mrs. Cahill told you that she should not have left the scatter rug at the bottom of the steps? A. Yes, sir.

Mr. Murphy: May I do it in questions, it will save time?

The Court: All right.

By Mr. Murphy:

Q. Do you recall your testimony that Mrs. Cahill told you that she had had that floor polished that day? A. Yes, sir.

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90 The Court: • • •

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Do you object to it going into evidence?

Mr. Murphy: I don't, but I don't want to offer it because we are in the position that I am going to ask for a directed verdict. I have contained my case, in other words, and this is not the same as the other evidence I put in.

I have no objection to him offering it.

Mr. Davis: All right.

The Court: Well, the record is clear, Mr. Davis,
91 this is a statement that has been referred to as Exhibit No. what?

Mr. Murphy: Defendant's Exhibit 2.

The Court: If he offers this evidence, the jury will have to give it such weight as they think it is entitled to.

If there is no objection, you may offer it and read it to the jury.

(Thereupon, counsel resumed their places in the courtroom and the following occurred:)

The Court: This statement will be given a Plaintiff's Exhibit number. Mr. Davis is going to offer this statement in evidence.

(The document previously marked Defendant's Exhibit No. 2 for identification was marked Plaintiff's Exhibit No. 15 for identification and was received in evidence.)

The Court: I take it you are not offering this to prove the truth of what is in the statement, but you are simply offering it as going to show what the plaintiff allegedly told the agent of the insurance company; is that correct?

Mr. Davis: That is correct, Your Honor.

Redirect Examination

By Mr. Davis:

Q. As I understand it now, this is what you told
92 Mr. Antoniacci on January 12th, 1961? A. Yes, sir.

Q. It was completely in his handwriting except for your signature? A. Yes, sir.

(Thereupon, Mr. Davis read Plaintiff's Exhibit 15 to the jury.)

By Mr. Davis:

Q. Now, Mr. McCarthy, I believe you said that was the first interview you had with Mr. Antoniacci; right? A. Yes, sir.

Q. You were mistaken on the date? That refreshes your memory that it was January 12th, 1961? A. Yes, sir.

Q. How long did that original interview take? A. It wasn't very long.

Q. Can you approximate, a half an hour or an hour? A. About a half an hour.

Q. Now, you say that he called you on the telephone several times after that? A. Yes.

Q. What was the purpose of those calls? A. To see how I was getting along.

Q. And your next personal visit by him was on December 20th, 1961? A. Yes, sir.

93 Q. Almost a year after the accident? A. Yes, sir.

Q. During any of that period, while you were dealing with Mr. Antoniacci, were you represented by a lawyer? A. No, sir.

Q. When your Workmen's Compensation claim was pending before the Workmen's Comp. Board, were you represented by a lawyer? A. No, sir.

Q. Are you versed in the law, Mr. McCarthy? A. No, sir.

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94 Mr. Davis: May I see Defendant's Exhibit 1, please?

By Mr. Davis:

Q. Now, prior to this exhibit, which is labled General Release, being handed to you by Mr. Antoniacci, did you see him filling in anything on the paper he handed you? A. No, sir.

Q. When he handed it to you, the only place that was visible, was the place where he pointed to sign? A. He said, Sign this receipt.

Q. Did he ever read this paper in its entirety to you? A. No, sir.

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Recross Examination

By Mr. Murphy:

Q. Who is the attorney for your business, Mr. McCarthy?

Mr. Davis: I don't see the materiality of that, Your Honor.

The Court: What is the materiality?

Mr. Murphy: He was asked whether he was represented by an attorney during this period.

The Court: All right, I will let him answer.

The Witness: When I had anything to come up, I usually have Joseph Mendelson.

By Mr. Murphy:

Q. Any business papers you want an attorney
95 to look at, you go to Mr. Joseph Mendelson? A. Yes.

Mr. Murphy: I have no further questions.

By Mr. Davis:

Q. If you had figured this was a business paper, you would have referred it to Mr. Mendelson? A. Yes, sir.

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Marie Margaret Etien

was called as a witness by the plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Davis:

Q. Will you state your full name to the Court and jury? A. Marie Margaret Etien.

Q. Where do you live, Mrs. Etien? A. 4554 MacArthur Boulevard, Northwest.

Q. What relationship are you to the plaintiffs in this action, Mr. and Mrs. Jeremiah McCarthy? A. Their daughter.

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96 Q. Do you recall the date of December 20th, 1961, when a man named Antoniacci visited your father? A. Yes.

Q. Where were you in the house on that evening? A. In the dining room, which is adjacent to the living room.

Q. Are those two rooms, the dining room and the living room separated by a door? A. There is an archway with a French door but the door was open.

Q. What were you doing on that occasion? A. I was wrapping some Christmas presents.

Q. Did you overhear any conversation between Mr. Antoniacci and your father on that visit? A. Yes, I did.

Q. Will you state to the Court and jury what was said by Mr. Antoniacci and what reply was made by your father? A. Well, Mr. Antoniacci had come to see
97 my father about an accident he had the previous year, and Mr. Antoniacci said that if my father would give him a receipt for medical bills, medicines, and this type of thing, and parking lot expenses, that he would give him a check to cover these expenses so far.

Q. Did your father produce any bills for medicines and parking lots, do you know? A. Yes, he came in the dining room, and he had these all together and he gave them to this man.

Q. Do you know what they came to, the total came to at that time? A. Well, I heard my father say that the total was $85.00 at the time.

Q. What response did Mr. Antoniacci make to that? A. Well, he said that for the time being, he would give him a check in excess of that—not a check, but would give him an amount in excess of that $85.00.

Q. How much in excess of the $85.00 did he say he would give him at that time? A. I think he said $135.00.

Q. A total of $135.00? A. Yes, sir.

Q. What else was said by Mr. Antoniacci at that time? A. Well, he was very cordial at the time, and he was just talking, very friendly, and this type of thing, and he said that this check was, you know, just for expenses
98 so far, and that my father could sign a paper that was a receipt for this money that he was to get to cover the expenses.

Q. You heard him ask your father to sign a receipt for $135.00? A. Yes.

Q. Did this man Antoniacci leave a check for $135.00 at that time? A. No, I don't think so. He said he was going to mail it to him, that he didn't have a check at that time.

Q. Was that substantially the extent of the conversation between Mr. Antoniacci and your father? A. Yes.

Q. And at the conclusion of that conversation, what did your father say to you or ask you to do? A. What did my father ask me to do?

Q. Yes. A. He called me in the room and asked me to give Mr. Antoniacci a bottle, and I delivered a bottle in a carton, which I brought into the living room and gave him.

Q. What kind of bottle? What was it, if you recall? A. Bourbon, Old Crow.

Q. Did Mr. Antoniacci accept it? A. Yes, he said, Thank you.

Mr. Davis: That is all. You may cross examine.

Cross Examination

99 By Mr. Murphy:

Q. Mrs. Etien, how far were you from where Mr. Antoniacci was during this conversation? A. Approximately from here to that table (indicating).

The Court: By that table, you mean where Mr. Davis is sitting?

The Witness: Yes, sir.

By Mr. Murphy:

Q. Did you stop what you were doing while they were having the conversation? A. No, there wasn't anything to stop, really.

Q. You were wrapping Christmas presents? A. Yes; nothing of great concentration.

Q. Was there any part of the conversation that you had difficulty in hearing because of the noise of the wrapping paper? A. Oh, no. Well, I wasn't eavesdropping. It was just something I overheard.

Q. You were wrapping things in paper and not really paying much attention to the conversation? A. Well, they were talking loud enough so it was audible, and I guess I was listening while I was wrapping.

Q. When were you asked after that occasion what you had heard? A. Well, when my parents came from
100 the living room to the dining room, they commented on it, and I said, Yes, I heard it, and then when that question came up of the release that was signed, I said that I did remember hearing this.

Q. At the time it was done, it was a pleasant interlude in which you were not involved? You were just in another room and overheard this? A. Yes.

Q. And it was after the question of a release came up when you were first asked to remember what you heard on that night? A. I imagine so, yes, sir.

Q. And you can remember precisely that the word receipt instead of release was used with regard to the paper? A. Yes, sir, I do remember that.

Q. And when in your recollection is it that the release first came up as a question? A. Oh, I would say, I guess that was about three months later.

Q. In your mind it was only about three months later? A. Yes.

Q. Would it refresh your recollection if I told you that the question of the release didn't arise until a year and a half after this event?

Mr. Davis: I object to that. He is characterizing the witness' testimony.

101 The Court: I will sustain the objection.

By Mr. Murphy:

Q. Has your father told you that it was at the time of the Compensation hearing that the question of a release first arose? A. Did my father what?

Q. Did your father tell you that the question of the release arose at the Compensation hearing? A. Yes, he told me that specifically.

Q. What brought up the question of the release that it was brought to your attention? A. I don't follow what you are saying.

Q. You say it was some time about three months after this occasion in December when this paper was signed that the question of a release arose.

What were the circumstances under which it arose? A. I don't really recall. I don't say that we sat down specifically and talked about a release and this type of thing.

I don't really understand what you are trying to get at.

Q. Well, at that time you are not sure whether the word release was used or not, but there was some question about what was said that night? A. No; at the time that I was wrapping the presents, I am sure that the word, you

102 know, that he said, this is a receipt, because I thought at the time he is a man representing a certain company, and that you would not want to sign anything.

Q. This occurred to you at that time? Did you voice that to your parents? A. Oh, no.

Q. Now, three months thereafter some conversation took place, according to your testimony, in which the question of the release or something was brought up, which caused you to be asked what was the conversation on that night; is that right? A. Yes, I would say.

Q. Was it the question of a release or something or other? A. No; it was just a question of, Do you remember what was said at the time?

Q. Did you ask why is it important that I remember that night? A. No.

Q. You were never told about a release then? A. No, not specifically, as I said before.

Q. When were you not specifically told about a release? A. Well, I was just made aware that this paper had been signed, and that I heard the man say that it was a receipt for this money, not a release, and I was made aware of the fact that it had been a release that was signed, rather than a receipt that the man said. That is what it was.

103 Q. And at this time when you were made aware it was a release and not a receipt, this is three months

after the evening on which it was signed? A. Well, I can't really say definitely three months, or it was five months, or a year and a half. Truthfully, I don't recall.

I do recall that the matter of the accident and this type of thing, it was discussed about three months later. It may have been at the Compensation Board thing.

Q. Is there any question in your mind that the word receipt was used with regard to the bills which your father presented to Mr. Antoniacci? A. No.

Q. It was definitely the word receipt? A. Yes, it was.

Q. And with reference to this piece of paper, the word receipt was used? A. Yes.

Q. And when both of these were used, you could not see what was going on? A. No, I didn't really see him sign it.

Mr. Murphy: I have no further questions.

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108 PROCEEDINGS

The Court: Do you have a preliminary matter?

Mr. Murphy: I would like to make a motion, Your Honor.

The Court: All right, I will hear you.

Mr. Murphy: At this time, Your Honor, I would like to move for a directed verdict for the defendant in this case.

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114 The Court: I will deny the motion at this time, You may renew it after all the evidence is in.

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115 Mr. Murphy: Would you call Mr. Antoniacci, please?

Thereupon

Gene E. Antoniacci

was called as a witness by the defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Murphy:

Q. Will you state your full name to the Court and jury? A. Gene E. Antoniacci.

Q. What position do you hold? A. I am presently employed as the Claims Manager for Ellett & Short. They are general agents for the Phoenix Insurance Company of New York.

Q. In December, 1960, what position did you hold? A. I was an adjustor for the same company.

Q. Are you acquainted with Mr. McCarthy? A. Yes, sir.

Q. When did you first become acquainted with Mr. McCarthy? A. Oh, some time late in December, 1960, or early January, 1961, after he had an accident.

Q. This accident occurred where? A. At the residence of Mrs. Cahill, whom we insured.

116 Q. Did you investigate the accident at Mrs. Cahill's home? A. Yes, sir.

Q. When you first contacted Mr. McCarthy, was it in person or by telephone? A. I think, as I recall, I phoned him and set up an appointment to see him within a week or so.

Q. What transpired when you had this appointment with him? A. Well, we generally discussed the accident, how it had occurred and what happened to Mr. McCarthy, as well as going into quite a bit of detail as far as his relationship with Mrs. Cahill, that is, by way of knowing her, and knowing her son, and things along that general line. Generally, that there was a close personal relationship.

Q. That is between Mrs. Cahill and Mr. McCarthy? A. Yes, sir.

Q. What was the nature of the relationship between yourself and Mr. McCarthy? A. Very congenial.

Q. Did you thereafter contact Mr. McCarthy? A. Well, I contacted him periodically from time to time, over the course of the next while, approximately, maybe once a

month or every other month, through that year until the and some time in mid-December.

117 Q. During this period of time did you have any contact with any other insurance company about this matter? A. Yes, sir.

Q. With whom did you have contact? A. Company or individual?

Q. Individual. A. Mr. Francis J. Bombara, who is Compensation Supervisor for the Firemen's Fund National Surety Company.

Q. What was the subject of your discussion with Mr. Bombara? A. Well, Mr. McCarthy's company carried their compensation insurance through the Firemen's Fund, and apparently this accident had been reported to them as a compensation case, arising in and out of the course of his employment, and a claim was presented against the company, and I basically called Mr. Bombara to find out the extent of the injuries and if they had any doctor's reports and things of this nature.

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118 Mr. Murphy: All I want is the subject matter, not what was said.

The Witness: Basically, it was relating to whether this company, that being the Firemen's Fund Company, would or would not pursue any subrogation or third party claim against Mrs. Cahill, in view of the payments that they would make to Mr. McCarthy on the compensation claim.

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139 The Court: I am going to admit this over objection by counsel for the plaintiff. You have your objection.

I will read this instruction to the jury.

All right, bring the jury in.

(Thereupon, the jury entered the courtroom.)

The Court: Now, ladies and gentlemen of the jury, before I read this instruction on the law as it pertains to

these papers, you are going to hear read to you by counsel for the defendant a copy of what is known as an adjustor's topical report, dated April 10th, 1961, which is taken from the file of the insurance company, which Mr. Murphy is representing here, and which employs the witness on the stand.

The copy I hold in my hand will be read to you by counsel for the defendant, it is four pages, I think, and is dated April 10th, 1961, and he will also read a little memo-
140 randum to you, dated August 2d, 1961.

And I will read to you now the instruction of law that will guide you in connection with your consideration of this evidence:

Ladies and gentlemen of the jury, counsel will read to you from a report written by Mr. Antoniacci some time before the release involved in this case was signed. In it Mr. Antoniacci expresses his opinion as to the merits of the plaintiff's case, and he also states some other things.

Now, this report is not to be considered by you as evidence of the facts stated by Mr. Antoniacci in this report, nor are you to consider the opinion held by Mr. Antoniacci as to the merits of the plaintiff's case.

This report is introduced, and you may consider it only to show the state of Mr. Antoniacci's mind when the report was written as it reflects upon the question of whether or not Mr. Antoniacci would intend or desire to make false representations to the plaintiff in this case and would intend to defraud him.

In other words, you are going to be called upon, after you have heard all of this evidence to decide whether or not what Mr. McCarthy said and his daughter said was the truth, or whether Mr. Antoniacci by his actions, in the report, and all the evidence was the kind of a man who would make that kind of a statement, or try to defraud someone.

141 This is a very simple issue, so you have a right to consider the state of his mind, and you can only get

to find out the state of his mind or his intentions by analyzing and evaluating all the evidence in the case.

Now, that is a very simple matter. That is the only reasons I am permitting this evidence to be read to you, so that you may ascertain what was in his mind at the time he allegedly made this statement or these statements to Mr. McCarthy, when Mr. McCarthy signed this paper.

The question is: Did he know whether it was a release? Was he defrauded? Was there a misrepresentation by this gentleman to get him to sign this paper?

Those are the issues in this case. All right, you may proceed. You may read these exhibits.

Mr. Murphy: For the sake of the record, Your Honor, I think I broke off before I laid the foundation for this, and they were kept in the ordinary course of business.

The Court: All right, you may go ahead.

By Mr. Murphy:

Q. Mr. Antoniacci, I show you two documents, and ask you whether you can say whether these documents are contained in the Ellett & Short claims file of Mr. McCarthy? A. Yes, sir, they were.

Q. And these documents are kept in the ordinary
142 course of business in the claims office? A. Yes, sir.

The Court: Suppose you have them marked for identification.

Mr. Murphy: Will you mark these Defendant's exhibits?

(The documents referred to were marked Defendant's Exhibits No. 3 and 4 for identification.)

Mr. Murphy: Now, ladies and gentlemen of the jury, pursuant to His Honor's instruction, I am now going to read these documents to you.

This one here is dated 8-2-61. Bombara, he will send copies of all med. reports which he has in his file, and then appears the initials of Mr. Antoniacci.

Then, another paragraph: They, parenthesis, Comp. carrier, close parenthesis, are not going to press a subro-

gated claim versus our assured. And again, Mr. Antoniacci's initials.

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143 Mr. Murphy: Now, I am going to read a memo-
144 randum, which was prepared and put in the insurance company file on April 10, 1961.

The Court: What exhibit number is that?

Mr. Murphy: I am sorry, Your Honor, No. 3 for identification.

It says:

Re. Florence M. Cahill-Jeremiah J. McCarthy. PH49-5-41, and then D/A, which stands for date of accident, 12-23-60.

And then it is entitled, Adjustor's Topical Report.

The Court: What date was that, April 10th, 1961?

Mr. Murphy: That is the date of the memorandum. And it is entitled, Adjustor's Topical Report.

(Thereupon, Mr. Murphy read Defendant's Exhibit 3, the memorandum dated April 10th, 1961, to the jury.)

Mr. Murphy: Now, I will offer these in evidence for the purpose Your Honor has stated.

The Court: They will be received.

Mr. Davis: The same objection.

(The documents previously marked Defendant's Exhibits No. 3 and 4 for identification were received in evidence.)

By Mr. Murphy:

Q. Now, Mr. Antoniacci, after this period in which
145 you kept contact by telephone, and which you have previously testified, did there come a time when you personally contacted Mr. McCarthy? A. Yes, sir.

Q. Will you state to the Court and jury what the occurrence was and what conversation was had upon that occasion? A. Well, this was shortly before Christmas in 1961, which was just about a year after the accident.

By that time, Mr. McCarthy, as I recall, had completed all his medical treatments with Dr. Rush, and as I testified

before, Mr. McCarthy indicated we maintain contact with his insurance carrier, the compensation insurance carrier, the National Surety Company, and they indicated to me that they had paid him for the time he lost and had taken care of all his medical bills, that doctors had rendered and the hospital had rendered.

Well, during the course of discussing this with Mr. McCarthy, I had asked him, Was there any expenses that he had personally, dollars and cents that he had to spend that his compensation carrier had not reimbursed him for, or which they would not reimburse him for.

And as I recall, something was said about $134.00 which he—well, let me redraft that.

I called at his house late on the afternoon I think, of December 20 in 1961, some time around 4 o'clock
146 and Mr. McCarthy was there and Mrs. McCarthy and some other children were around, and we sat in the front living room and discussed the situation, as we had on previous occasions, and he had certain expenditures by receipts, he had receipts from a pharmacy for approximately $95.00.

And then he indicated he had had to buy a bed board and a heating pad.

And he had some transportation expenses in going to the doctor and parking his vehicle, and normal parking charges, which approximated $16.00, something like that.

And the total of these expenses that he had was, as I recall, $134.15.

So I asked him if he wanted to be reimbursed for these expenditures, and I would take a release on the claim.

And we discussed the matter in what I thought was a quite congenial manner, as we had on previous occasions, and I drew up a release for $135.00, and gave it to him, and he read it over, and he signed it, and I don't recall if Mrs. McCarthy, if they both read it at the same time, or one read and signed it and the other read and signed it. But I recall they both signed it.

And I took the release back to the office, and that day or the next day we issued a draft in the amount of $135.00.

Mr. Murphy: Will you mark these?

(The documents referred to were marked De-
147 fendant's Exhibits No. 5, 6, and 7 for identification.)

By Mr. Murphy:

Q. I hand you what has been identified as Defendant's Exhibit No. 5 for identification, Mr. Antoniacci, and ask you whether you can tell me what that document is? A. These were the drug receipts that I received from Mr. McCarthy on the date that we discussed the matter, and he executed the release, and as a result of which we issued the draft.

Q. I show you what has been marked for identification as Defendant's Exhibit 6 and ask whether you can identify what that is? A. This is another organization, drugs from the Foxhall Village Pharmacy, for prescriptions of Mr. McCarthy.

Q. I show you what has been marked as Defendant's Exhibit No. 7 and ask you whether or not you can identify what that is? A. This is another drug receipt, or a receipt anyway, from the Foxhall Village Pharmacy to Mr. McCarthy for various charges, which were given to me as being expenses, charges that he incurred for drugs, that he had to buy because of the injuries.

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150 Mr. Davis: The very fact of his reluctance indicates that there must be some impeaching evidence in there.

Mr. Murphy: Oh, Mr. Davis—

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155 **Gene E. Antoniacci**

resumed the stand pursuant to the recess and testified further as follows:

By. Mr. Murphy:

Q. Following the visit to Mr. McCarthy's home and your forwarding of the draft of $135.00, did you make an accounting to your employers at that time for the money you had spent and given to Mr. McCarthy? A. Yes, sir, I have. That is contained in the file.

Mr. Murphy: Would you mark this?

(The document referred to was marked Defendant's Exhibit No. 8 for identification.)

By Mr. Murphy:

Q. I show you what has been marked Defendant's Exhibit 8 and ask you whether or not you can identify that slip of paper? A. Yes, this is the memorandum to the file which I dictated after discussing the matter with Mr. McCarthy and securing the release, and I just itemized it.

Q. Just tell me—this came from the insurance
156 company file? A. Yes, sir.

Q. Was a report made to your employers in the regular course of business? A. Yes, sir.

Mr. Murphy: In line with what we discussed at the bench, I would like to read part of this, Your Honor.

The Court: All right. Read the part that has to do with the accident?

Mr. Murphy: That is right.

Mr. Davis: This goes in subject to the same objection, Your Honor?

The Court: Yes. What is the date?

Mr. Murphy: December 28th, 1961, and we are reading the part that deals with the accounting.

The Court: Very well.

Mr. Murphy: Ladies and gentlemen of the jury, this memorandum was, as you heard, submitted to the insurance

company file on December 28th, 1961, and there is contained therein an accounting of the $135.00 which has been authorized by Mr. Antonaicci.

A bill from Foxhall Village Pharmacy, $58.81.

A bill from Foxhall Village Pharmacy 3-31-61, $40.99.

Individual prescriptions total $9.35.

Heating pad, $5.00.

Back rest, $4.00.

157 Transportation for three months to doctor, $16.00.

Total, rounded off, $135.00.

And I believe we can stipulate that the total of that comes to $134.15.

By Mr. Murphy:

Q. Now, following your discussion with Mr. and Mrs. McCarthy on the evening that the release was signed, Mr. Antoniacci, did you meet any other members of Mr. McCarthy's family? A. I don't recall meeting anyone specifically. There were other members of the family in and about the premises. I think they were Mr. McCarthy's children, as I recall.

Q. What was the tenor of your parting with Mr. McCarthy? A. Well, everything was very sociable, as had been all the way from the first time I met Mr. McCarthy.

He was very congenial with me, and I felt very friendly disposed toward him.

In fact, as I recall, when I left or as I was getting ready to leave, after he had signed the release, I think someone, it may have been his daughter was wrapping some packages. I don't know whether they were Christmas presents or what, but this is again from memory, and it has been a number of years, I think they may have been bottles of whisky or bourbon, or something of this nature, that he was going to give to a lot of his clients and business

158 associates, and as I left, he gave me one and said, Here, Merry Christmas, and I accepted it.

Q. When thereafter did you next hear that Mr. McCarthy was making a claim? A. Well, the next thing—what do you mean by making a claim, sir?

Q. On the evening of December 20th, 1961, you obtained a release from Mr. McCarthy; is that right? A. Yes, sir.

Q. And thereafter there came a time when you were informed that Mr. McCarthy was going to make a claim against Mrs. Cahill, did there not? A. As I recall, early in May of 1963, we received two papers with a note from Mrs. Cahill indicating that a suit had been filed against her by Mr. McCarthy.

Mr. Murphy: I have no further questions, Your Honor.

Cross Examination

By Mr. Davis:

Q. Mr. Antoniacci, are you a member of the bar? A. No, sir.

Q. Have you ever studied law? A. Yes, sir.

Q. Where? A. Catholic University of America.

Q. How much of the course did you complete? A. I received my LL.B. in 1960.

159 Q. 1960? A. Yes, sir.

Q. In June of 1960? A. Yes, sir.

Q. So that when this purported release, Exhibit No. 1, was obtained by you, you were a full fledged law graduate, were you not? A. Yes, sir.

Q. Though you had not been admitted to the Bar? A. No, sir.

Q. Had you taken the Bar examine in the last four or five years. A. No, sir.

Q. You have been with this same company all this time? A. Yes, sir.

Q. In the claims adjusting? A. Yes, sir.

Q. As I understand your testimony, you actually only saw Mr. McCarthy personally on two occasions; is that right? A. Yes, sir.

Q. January 12th, when you obtained this statement—may I see Exhibit 14?

Mr. Antonacci, I show you what has been received in evidence as Plaintiff's Exhibit 15 and ask you if that is not the original statement that you took from Mr.
160 McCarthy concerning his claim on January 12th, 1961? A. Yes, sir, that is the statement.

Q. That is the only time you saw him personally before the execution of this so-called release? A. I think so, yes, sir.

Q. Now, in this statement he told you that he was delivering a radio which Mrs. Cahill had purchased, did he not? A. Yes, sir.

Q. That he brought the radio to an upstairs room in the house at her direction? A. I don't recall if it was at her direction, or I don't know that. I don't recall. I haven't the statement in front of me. So whether it was at her direction or something he did for her, I don't recall specifically.

Q. Then the statement continues:

I then walked down the steps preparatory to leaving. Just as I got to the bottom of the step, I stepped on a small scatter rug which was at the base of the stairs.

My left foot and the rug slid out from under me, causing me to land on my left arm and my face. My nose began to bleed and my arm ached. I was able to get up.

Mrs. Cahill's maid got a chair for me. I sat there for a while and then left.

161 I drove back to my home, where a friend of mine took me to Georgetown Hospital. Dr. Rush saw me, and they took x-rays, which revealed a fracture at the joint in my left arm, which they put in a cast, and I was released from the hospital that evening.

I don't know how long I shall be in a cast.

I am receiving compensation. My medical expenses are being paid by our compensation insurance carrier, National Surety Company.

This statement is true and correct.

Signed by Mr. McCarthy, and witnessed by you.

Now, is that all he told you on that first occasion? A. There may have been other things he told me. I think the statement is, you may say cursory, because of the fact that he indicated to me that he did not want to, and had no intention of, nor would ever consider presenting any claim, and in fact, as I say, that is the reason you may say this is cursory, and it is not as detailed as maybe it should have been under these circumstances.

Q. Did he tell you on this occasion of January 12th, 1961, that this being just before Christmas, he was in a hurry? A. I don't specifically recall that he did or not.

Q. If he had told you that, you would have put
162 it in here, wouldn't you? A. I don't think so. As I say, the statement was only dealing with the very few material facts on the situation, and that it was done so I would have a record of approximately what he indicated had occurred and I didn't go into a lot of detail.

Q. However, he did tell you that his medical expenses were being paid by the National Surety Company, which was his own insurance company, did he not? A. Yes, sir.

Q. As a law graduate and the holder of an LL.B. Degree, you knew on that occasion, did you not, that they were subrogated for any third party claim he had? A. Yes, sir.

Q. On this January 12th, 1961, visit, did he tell you also that Mrs. Cahill had a cocker spaniel that was lapping up his blood as fast as he bled? A. I don't recall that, sir, no.

Q. Did he tell you when Mrs. Cahill came down from the stairs, she made the statement to him that she should not have left that rug there because other people could fall on it? A. No, sir, I don't recall this statement being made.

Q. Would you deny he made that statement? A. I can't deny it because, as I say, I don't recall if it was made.

Q. At any rate, you didn't put that in here, did you? A. No, sir.

163 Q. Did he tell you on that occasion that Mrs. Cahill also admitted to him that this vinyl tile floor had just been waxed and polished that very morning? A. I would say that I definitely remember that he did not make such a statement because it would have been definitely contrary to what I had been told by Mrs. Cahill. I am sure I would have remembered it.

Q. You remember he did not make such a statement? A. Yes, sir.

Q. If he had made such a statement, would you have put that in here? A. Yes. It was contrary to the facts as I understood them at the time, and they would have been included in that report.

Q. You knew that he was unversed in the law, did you not? A. What do you mean by that, sir?

Q. Knew nothing about legal matters? A. I don't know whether he did or didn't. I know he had his own business.

Q. In your several conversations with him, you were very much interested in joining the Knights of Columbus, were you not? A. Yes, sir.

164 Q. And you asked him how to go about it? A. I think we discussed how to go about it, and as I recall, he has a brother that is associated with the Knights in quite a high capacity.

Q. On the December 20th, 1961, visit, that was only the second time that you saw him personally, wasn't it? A. Yes, sir.

Q. On that occasion, did he tell you he had trouble with one of his eyes as a result of this fall, that he would momentarily go blind? A. No, sir, I don't recall that.

Q. Did you tell him that you knew how it felt because you were just getting over an eye condition? A. Did I tell him—excuse me.

Q. Did you tell him that you knew how he must feel because you were just getting over such an eye condition? A. Well, I may have related to him my eye difficulties. I don't recall that he indicated that he had eye difficulties also.

Q. You did have eye difficulties, did you not? A. Yes, sir.

Q. He wouldn't have known that unless you told him that; isn't that true? A. That is right, sir.

Mr. Davis: May I see Exhibit No. 1, please?

By Mr. Davis:

165 Q. I show you now, Mr. Antoniacci, Defendant's Exhibit No. 1, this paper which is headed General Release.

Aside from the printed matter contained on this paper, did you fill these items in in the presence of Mr. and Mrs. McCarthy? A. Yes, sir .

Q. Before you asked either one of them to sign it? A. Before I asked them to sign it?

Q. Yes. A. I don't recall the exact sequence of events when it was filled in.

The Court: Mr. Davis, will you stand back there, please, and keep your voice up?

By Mr. Davis:

Q. My question was: Aside from the printed matter, what appears in your handwriting in the body of the statements—are your handwriting, are they not? A. Yes, sir.

Q. Where it says $135.00, Florence M. Cahill, 23d of December, 1960, address, 4646 Hawthorne Lane, Northwest, Washington, D. C., I am asking you now, did you fill these items in before you handed this paper to Mr. and Mrs. McCarthy for their signature? A. Did I fill it in?

166 Q. Yes. A. Oh, yes, sir, definitely.

Q. Isn't it a fact that you filled this item in after you got back to your office? A. No, sir, definitely not on that.

Q. Did you hand this paper to Mr. and Mrs. McCarthy free, folded out as it is now in my hand? A. Exactly like that, sir.

Q. Did you ever read the contents of this paper to them before they signed it? A. I didn't read it to them. I don't recall that I read it to them. I handed it to them and asked them both to read it.

As I stated previously, I don't recall that they read it simultaneously or individually, but they both looked at it and then signed it.

Q. Did either or both of them read it in its entirety? A. Out loud?

Q. Or to themselves, that you observed it?

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The Witness: They didn't read it out loud that I
167 can recall, sir. I presume they read it by looking over it.

By Mr. Davies:

Q. All three of you were in one room, were you not? A. Yes, sir.

Q. The living room? A. Yes, sir.

Q. All around a table, were you not? A. Yes, sir.

Q. Now, my question is— A. No, excuse me, we were in the living room, and then there is another room off the living room, and as I say, it has been three years since this occurred, there is another room, a dining room, and I was in there for a short time, and I don't recall exactly where we were, you know, when Mr. and Mrs. McCarthy signed it.

Q. My point is, when you handed this paper opened up as I have it now to either Mr. or Mrs. McCarthy, all three of you were together, were you not? A. Yes, sir.

Q. Did you observe either or both of them actually take the paper and look at it long enough to read it in its entirety? A. I don't specifically recall.

Q. Isn't it a fact, Mr. Antoniacci, when you handed this paper to Mr. McCarthy for his signature, you had it
168 folded and said, sign it here? A. No, sir, I did not.

Q. You deny that? A. No, sir; I did not do that.

Q. When you asked for receipts for medications and parking lot fees and so on, is this all he brought you, were these memos 5, 6, 7, and 8? A. You are talking about the prescriptions?

Q. Yes. A. Yes.

Q. They were all in one sheet, were they not? A. No, there are a few different. One was for $50 some, and one for $40 some, and three small charges.

Q. Did Mr. McCarthy total them in your presence? A. I don't recall whether he totaled them or I totaled them, sir.

Q. Isn't it a fact that the total at that time only came to $85.00? A. No, sir. It was $134.15 as I computed it.

Q. You gave him 85 cents more than the actual total that you computed? A. Well, these were the items which he indicated to me had not been paid by the compensation carrier, and for which we were reimbursing him.

Q. At any time before Mr. McCarthy signed this
169 paper, Exhibit 1, did you tell him this was just a receipt for what you were about to pay him on account? A. No, sir.

Q. Do you deny making that statement? A. Sir?

Q. Do you deny making that statement? A. Yes, sir, I do.

Q. Your testimony is that you told him this was a release of any further claim he might have? A. Yes, sir. The release speaks for itself. I don't recall if I said specifically, This is a release of any further claim. I feel I properly indicated that this is a release as far as Mrs. Cahill is concerned, releasing her from any claim.

Q. You knew at that time that he had been off work immediately following this accident some 11 weeks, did you not? A. Yes, sir.

Q. You knew that his total salary was $140.00 a week, did you not? A. Yes, sir.

Q. You knew that what had been paid by way of compensation was $90.00 a week less than his actual salary,

didn't you? A. That is what the information he gave me towards loss of income. Whether he sustained it, I don't know.

Q. Did Mr. McCarthy before signing Exhibit 1 say
170 to you, Will this have any effect or bearing on the balance of my claim? A. I don't recall that he did or not.

Q. You don't recall that? A. No.

Q. As a law graduate, you would recall it, would you not? A. Yes, sir, I think I would.

Q. You knew if this were a real genuine release, it would have an effect on the balance of his claim, wouldn't it? A. It would have no—well, I don't know what you are driving at.

Q. He would have no further claim, isn't that true? A. Well, this is a release of the claim he was having against Mrs. Cahill.

Q. That is the only claim we are talking about, against Mrs. Cahill? A. Yes, sir.

Q. The one in litigation here now? A. Yes.

Q. This release reads this way:

For and in consideration of the payment to me, us, of the sum of $135.00, and other and valuable consideration, I, we, being of lawful age, have released and discharged,
171 and by these presence, do for myself, ourselves, my, our, heirs, executives, administrators and assigns, release, acquit and forever discharge Florence M. Cahill and any and all other persons, firms and corporations of and from any and all actions, causes of action, claims or demands for damages, costs, loss of use, loss of services, expenses, compensation, consequential damage or any other thing whatsoever on account of, or in any way growing out of, any and all known and unknown personal injuries and death and property damage resulting or to result from an occurrence or accident that happened on or about the 23rd day of December, 1960, at or near 4646 Hawthorne Lane, Northwest, Washington, D. C.

I, we, hereby acknowledge and assume all risk, chance or hazard that the said injuries or damage may be or become permanent, progressive, greater, or more extensive than is now known, anticipated or expected. No promise or inducement which is not herein expressed has been made to me, us, and in executing this release I, we, do not rely upon any statement or representation made by any person, firm or corporation, hereby released, or any agent, physician, doctor or any other person representing them or any of

doctor, or any other person representing them or
172 any of them, concerning the nature, extent or duration of said damage or losses or the legal ability therefor.

Mr. Murphy: I think that word should be, legal liability therefor.

By Mr. Davis:

Q. Yes, legal liability therefor.

I, we, understand that this settlement is the compromise of a doubtful and disputed claim, and the payment is not to be construed as an admission of liability on the part of the persons, firms and corporations hereby released by whom liability is expressly denied. I, we, further agree that this release shall not be pleaded by me, us, as a bar to any claim or suit.

This release contains the entire agreement between the parties hereto, and the terms of this release are contractual and not a mere recital.

I, we, further state that I, we, have carefully read the foregoing release and know the contents thereof, and I, we, sign the same as my, our, own free act.

Now, it has taken me approximately two and a half minutes to read that thing in its entirety.

Is it your testimony now that either Mr. McCarthy or

both of them read the entire release before they
173 they signed it? A. We were discussing Christmas and many things in general at the time, and I do not

specifically recall if they took two and a half minutes, but when, as I say, when I was talking to Mr. McCarthy, Mrs. McCarthy may have been reading it, and vice versa. The conversation continued, so what the specific lapse of time was when one was not joining in the conversation, I don't know.

Q. But at least you didn't read it aloud to them as I just read it to you? A. No, I stated this before.

Q. I show you now Defendant's Exhibit No. 3, Mr. Antoniacci, which is a four-page, would you call this an inneroffice memorandum? A. Are you asking me that question sir?

Q. Yes. A. It is what is referred to as an Adjustor's Topical Report.

Q. It is not addressed to anybody, is it? A. It is addressed to the file.

Q. Addressed to the file? A. Yes, sir.

Q. This is made— A. It is transmitted to the home office of the company.

Q. This is made April 10th, 1961, over eight months before you took Exhibit 1, the purported release? A. Yes, sir.

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Q. Did you type this by yourself, Mr. Antoniacci? A. No, sir, I dictated it on the Dictaphone machine, and then they transcribed it by one of the—

Q. One of your secretaries transcribed it? A. Yes.

Q. And put it in typewritten form? A. Yes, sir.

Q. And it became part of your file? A. Yes, sir.

Q. Did you dictate this in anticipation of extracting a full release from Mr. and Mrs. McCarthy eight and a half months later? A. I dictated that as my report on the circumstances of the accident, the general tenor of the parties involved, and what I felt the evaluation would be by me.

Q. Did you dictate a later memorandum after December 20th, 1961, concerning this so-called settlement? A. Yes.

The Court: I have already ruled, Mr. Davis, that any-

thing prior to December 20th or 21 would be looked at by you or may be offered in evidence. I am sure that is my ruling.

I haven't made a ruling on the subsequent matter yet.

By Mr. Davis:

175 Q. Directing your attention, Mr. Antoniacci, to the third page of this Adjustor's Topical Report, and directing your attention to the second line, under the heading, Liability, where it reads:

> This is is a case of very questionable liability on the part of the insured, in that the claimant was on the premises merely as a business invitee.

That is what you dictated, did you not? A. It would appear that way, yes, sir.

Upon reading it over, I think I reflected the terminology was incorrect.

Q. Who made the strike out and interlineation and inserted the words, bare licensee? A. I think I did, sir, and if you let me look at it, I can tell you whether I did or not.

Q. All right. A. Yes, sir, that is my handwriting.

Q. That is your handwriting? A. Yes, sir.

Q. You testified several moments ago that you fully investigated this accident, did you not? A. Yes, sir.

Q. You knew that Mr. McCarthy was delivering a radio to Mrs. Cahill at her request, did you not? A. Yes, sir.

176 Q. You knew it had been a c.o.d. order? A. I don't recall that I knew that.

Q. Didn't Mrs. Cahill tell you she gave him a check for $56.00, the cost of the radio? A. I don't recall that.

Q. You knew he wasn't there as a social guest? He was thereon business, wasn't he? A. He was delivering a radio.

Q. That made his a business invitee, didn't it?

The Court: Now, wait a minute. Are you going into a discussion of the difference between an invitee or a licensee?

I mean, we don't want to confuse this jury between the two terms. Does it make any difference?

Suppose the witness used the word invitee, or vice versa, or used licensee.

As far as the issue in this case is concerned, does that make any difference?

If it does, I will let you proceed.

Mr. Davis: Well, this goes to the question of the credibility of the witness.

Do you recall when you made this interlineation?

The Witness: No, sir, I don't.

The Court: If he knows, let him testify.

Mr. Murphy: If Your Honor please, I think we can stipulate, with Mr. Antoniacci's permission, that he
177 might have made an error of law.

The Court: That is up to the jury. I don't think we ought to get into that.

The Witness: I would say stipulate.

By Mr. Davis:

Q. Now, where did you get this information from on the third page? Also due to the fact that this was the week end preceding Christmas, claimant, meaning Mr. McCarthy, was exceedingly busy and in all probability he was rushing in some manner and as such was probably guilty of contributory negligence? A. Well, the facts, I think as far as the time of the year speak for themselves, Mr. Davis.

I ascertained from talking to Mr. McCarthy that he had been very busy at that time of the year, and the conclusion, I presume I told myself, as far as the hurrying up, this being the time of the year that a business man had many things to do.

Q. That was just your assumption, wasn't it? A. Yes, sir.

Q. That he was probably rushing in some manner? A. Well, in discussing it with him, I got the general feeling from him that he was very busy before Christmas, as most people in business are.

Q. Well, you didn't put anything like that in your January 12th, 1961, statement, did you? A. No, sir, I
178 think we discussed that before, the cursory nature of that statement.

Q. You were trying to make this claim appear in the best possible light to your company? A. No, sir, I was trying to recite the facts.

Q. You were trying to save your company from this liability under this $100,000 coverage for liability for personal injuries, weren't you? A. No, sir.

Mr. Murphy: I object, Your Honor.

The Court: I will let him answer, if he can.

The Witness: Would you repeat the question, sir?

By Mr. Davis:

Q. You were trying to save your company, if possible, from any liability under this $100,000 exposure? A. I wasn't trying to save them from any liability, and as I stated, this was basically an investigation of the facts and determination of the legal liability, and as I further stated, based on what Mr. McCarthy had said and what he led me to believe was his sentiments in the matter, I had no thought that this situation would at any time end up in litigation.

Q. On the first page of this Exhibit No. 3, you state under the heading Insured's Version, The insured was not a witness to this accident. However, she was on the scene immediately after the accident. She substantiates
179 Mr. McCarthy's statement of the facts. A. That is as far as the circumstances that happened, that he was descending the steps, and stepped on a rug, and she heard, and she was upstairs and had been talking with him, and turned around, and was returning to the bedroom, or whatever room she was returning to, and heard a thud coming down the stairs, and found him either getting up, or I don't recall the exact situation.

Q. And the claimant's statement of facts were as expressed in the signed statement of January 12th, 1961? A. Yes, sir.

Q. Then you have under the heading, Witnesses, None. Police report, None. A. This is a general format for these reports, sir.

There is a paragraph for each of these. If there is a police report, it would indicate the police did investigate and so forth. This is something that is used for automobile accidents, as well as general liability situations.

Q. When you found out that your assured, Mrs. Cahill, was not a witness to the accident, who else did you interview in connection with your investigation? A. On that, I talked with the house maid and the house man.

Q. And both of them told you they hadn't seen it, too; isn't that correct? A. That is right.

180 Q. So you had no witnesses to interview as to the facts to controvert them as given to you by Mr. McCarthy? A. No, sir.

Q. Were you one of the individuals who attended the informal conference in the Workmen's Compensation Commission in August, 1962? A. No, sir.

Q. Was any of your company's attorneys at that conference? A. No, sir.

Q. Did anybody from your company offer this paper, No. 1, the release at that occasion? A. No, sir, not to my knowledge.

Q. Did you hear the opening statement of your counsel when we started this trial yesterday? A. No, sir, I was out of the courtroom.

Q. Is it the practice of your office, I am referring now to the Phoenix of London Group, that you cannot close a file until you get a release? A. As a general practice, we like to have a release closing out the file, and we know that the matter is closed and it is not subject to being reopened in another year, within the ordinary statute of limitations period, within which such claims could be filed.

Q. Now, when Mr. McCarthy made his statement to you that he didn't care to prosecute a claim, that is, by
181 filing suit, you knew all along he was making a claim, did you not? A. Yes, I knew he was making a claim against his own insurance carrier, the compensation carrier.

Q. You knew he was making a claim against Mrs. Cahill, too, didn't you? A. What do you mean by that, sir?

Q. Well, what was the purpose of your two visits and these repeated telephone calls if he wasn't making a claim? A. As I stated, initially he told me, he stated to me he had no intention of making any claim against Mrs. Cahill. He thought very highly of her and did not hold her responsible for the accident, and merely wanted to be compensated for his loss of time, as well as his medical expenses by his own carrier.

Q. Didn't you state in Exhibit No. 3—I will use your exact words—under the heading, Settlement Negotiations, In all probability there will be no settlement negotiations whatsoever relative to this claim as Mr. McCarthy has time and time again indicated that he has no intention whatsoever of attempting to prosecute same, that is, by legal counsel.

Now, when you prosecute a claim, you prosecute it in the Courts, do you not, by way of a suit? A. Maybe that is what the word states there but this was not considered at the time.

He indicated to me he wanted nothing from Mrs. Cahill or from her insurance carrier, as he felt this would
182 be a reflection on her personally.

Q. Well, the fact of the matter is he didn't get anything from Mrs. Cahill personally, isn't that true? A. No, sir, he got it from her insurance company.

Q. The Phoenix Indemnity of London paid $135.00? A. Yes.

Q. And if his claim justified any more, Phoenix of London would have paid it, not Mrs. Cahill? A. That is right, and she was covered by a policy of insurance.

Q. Her policy was good for two years and the premium was paid, and it would not have cost her one cent? A. As I said, his opinion was that this would personally reflect on her, and he did not want such a reflection cast.

Q. According to that policy, isn't your company obligated to furnish counsel to defend him? A. Yes, sir.

Q. If there is a judgment to pay that legal judgment? A. Yes, sir.

Q. So in any event Mrs. Cahill had nothing to lose by it, except possibly her time in Court? A. Well, I don't want to keep repeating the same thing, Mr. Davis, but as I say he did not, he indicated to me he wanted to do nothing which would reflect on Mrs. Cahill personally, either by receiving money from her or her insurance carrier,
183 or anyone connected with her.

He thought he was adequately insured, and he advised me that this was all he wanted out of the matter, and he wanted nothing further.

Q. Now, you didn't dictate this interoffice memo with this Topical Adjustor's Report in 1961 in anticipation of any future dealings with Mr. McCarthy, did you? A. It was merely, as I said before, a memo to the file advising the company of what the investigation reflected, and the attitude of Mr. McCarthy, and how he intended to proceed with the matter.

Q. Is there anything in that four-page exhibit of April, 1961, that is dated April 20th, 1961, that reflects your mental attitude on December 20th, 1961?

Mr. Murphy: If it please the Court, I don't understand the question.

The Court: I don't understand the question myself.

Mr. Davis: Well, I understood that was the only purpose for which it was admitted in evidence, if Your Honor please.

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184 By Mr. Davis:

Q. Now, you had checked during the one-year pendency of this claim, that is, one year succeeding December 23d, 1960, your central index file, had you not? A. Yes, sir.

Q. And you found that Mr. McCarthy had never made a claim against anybody before in his lifetime; isn't that true? A. Yes, sir, that is what the index file reflected, yes, sir.

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187 Mr. Davis: I am satisfied with that, Your Honor.

While we are at the bench, Your Honor, I have some rebuttal testimony, including Mrs. McCarthy. Due to the fact that she is just out of the hospital, may she testify from the wheel chair?

188 The Court: Yes, surely.

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The Court: Have you finished with this witness?

Mr. Murphy: Yes, sir.

The Court: Have you finished cross examination?

Mr. Davis: Yes, sir.

The Court: Do you have any other witnesses?

Mr. Murphy: No, sir.

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189 The Court: All right, Mr. Davis, you may proceed.

Mr. Davis: Yes, Your Honor.

I will call Mrs. McCarthy to the stand.

Thereupon

Anna Marie McCarthy

one of the plaintiffs, was called as a witness and, being first duly sworn, was examined and testified as follows:

By Mr. Davis:

Q. Mrs. McCarthy, will you state your full name to the Court and Jury? A. My name is Anna Marie McCarthy.

The Court: Now, excuse me, Mrs. McCarthy, I realize your condition, but if you will speak a little louder, all these ladies and gentlemen want to hear you.

The Witness: Yes, sir.

My name is Anna Marie McCarthy.

The Court: That is better. Can everybody hear her?

By Mr. Davis:

Q. What relationship are you to the co-plaintiff, Jeremiah McCarthy? A. The co-plaintiff is my husband.

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Q. How long have you been married? A. Well, it will be 35 years in January.

Q. You have just been released from Sibley Memorial Hospital, have you not? A. Yes, sir.

Q. When was that? A. On Sunday, this past Sunday.

Q. Following surgery on November 5th? A. That is right, sir.

Q. Mrs. McCarthy, I show you what has been received in evidence as Defendant's Exhibit No. 1 and ask you if this is your signature, below your husband's? A. May I get my glasses out? I can't see well without them.

Q. Yes. A. Yes, sir, it is.

Q. And that is your husband's signature just above it? A. Yes, sir.

Q. Mrs. McCarthy, when this paper was signed by you and Mr. McCarthy on December 20th, 1961, will you state to the Court and jury the circumstances surrounding the signing of that paper by you and your husband? A. Yes, sir. On the afternoon of the said date Mr. Antoniacci came into our home, and he said that due to the fact that my husband had suffered this fall on the previous Christmas, the 23d of the previous year, December, the previous year that he was—well, really so surprised by the fact that we hadn't done anything in the way of trying to sue the party in whose home my husband had fallen, and he said because of this that he and his company were very grateful, and that they felt that they should

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try in some way to compensate him for his thoughtfulness, and that he would like to offer to pay for the medical, that is, the pharmacy, and the prescriptions, and the things, such as heating pad, parking tickets, and anything that was relevant to the visits and the comfort of the healing of this particular fall.

Q. What did Mr. Antoniacci call this paper? A. Well, he said that it would be, if we would sign this receipt—

Q. Receipt? A. Yes, sir.

Q. When you signed it and your husband signed it, did either of you read it? A. No, sir.

Q. Did he read it to you? A. No, sir.

Q. Did he ever tell you this was a general release? A. No, sir. In fact, my husband asked him if this
192 would in any way alter the compensation that he had been paying for many years in his business, if it would alter the compensation, and he said it would alter nothing, that this was just a form of gratitude.

Q. When this paper was handed to you in what manner was it handed to you? A. Well, it was folded.

Q. Folded? A. Yes, sir, and of course, my husband signed it, and my husband and I have many times co-signed checks and notes, and I was just in the habit of taking the pen and signing it, which I did at this time.

I had no suspicion. I felt that he was a man of high integrity—

The Court: I think that is argumentative. She can tell what she did or what he said.

By Mr. Davis:

Q. You are positive that he termed this a receipt for moneys he was about to pay? A. That is correct.

Mr. Davis: I have no further questions.

Cross Examination

By Mr. Murphy:

Q. Mrs. McCarthy, was the word receipt used in connection with anything else that evening? A. Well,

193 actually, you know, you would have to have a very retentive memory to look back five years and say, Well, you remember the conversation, but I remember specifically that this was described as a receipt at that time.

Q. You don't recall whether anything else was described as a receipt that evening? A. Actually, I don't recall entering into the conversation at all too much, because he had made these, he had made all the arrangements verbally with Mr. McCarthy, and while I was there, I was also cognizant of the fact that other things were going on in my home, and I wasn't really paying that much attention to terms, and I wasn't suspicious of anything, naturally.

Q. Was the piece of paper which has been described as Defendant's Exhibit 1, was this in blank when you signed it? A. Yes, it was. Mr. Antoniacci said he didn't have the proper form of check, and that he would fill it in and mail it to us the next day or two, which he did.

Q. In connection with the check, I understand that he said he didn't have one with him, but the paper which you signed, was this in blank? A. To my knowledge it was. It was folded, as I said, and to my knowledge it was not filled in.

Q. Being folded, you could not see the piece of paper? A. That is true.

Q. Therefore, you don't know whether it was in

194 blank or not? A. Well, that is true, too.

Q. When did the check come to the house? A. Oh, I could not remember that either, specifically, but it was in a very few days.

Q. Do you get mail normally in the middle of the day? A. Well, before noon, depending on the mail itself, I guess, that the carrier has to bring into various places.

Q. And the letter from the insurance company was addressed to both you and your husband, was it not? A. I assume it was. I don't remember that either.

Q. Do you have any recollection of opening the envelope

in which the check came? A. Frankly, I don't remember that. I mean, I don't remember who opened it, since it was addressed to both of us.

Q. Mrs. McCarthy, I am showing you there Defendant's Exhibit 1-A. Does your signature appear thereon? A. Yes, it does.

Q. Do you remember signing that? A. Well, it is evident that I signed it, yes.

Q. And it is obvious the printed matter appears above your signature, doesn't it? A. Yes, but I don't even remember reading it, frankly.

Q. Can you say that you did not read it when you
195 signed it? A. Frankly, I couldn't say either way.

Q. From the order of the signatures on that draft, can you now recall how you signed it or when you signed it? A. What do you mean?

Q. Your signature appears second, doesn't it? A. Yes. Well, as I say, we co-signed so many papers that I assume when Mr. McCarthy signed it, he asked me to sign it, and I did, you know, probably signed it immediately after.

Mr. Murphy: Will Your Honor indulge me just a moment, please?

By Mr. Murphy:

Q. Mrs. McCarthy, when the paper which has been identified as Defendant's Exhibit 1, that is the paper that was given to you which was folded over— A. Yes.

Q. When that was given to you, was there any carbon paper with it? A. I really could not say that either. I just remember signing it, because I was asked to. I felt it was in order and I just signed it.

Mr. Murphy: I have no further questions, Your Honor.

Mr. Davis: May this witness be excused, Your Honor?

The Court: She may be excused.

(The witness was excused.)

196 Mr. Davis: Take the stand, Mr. McCarthy. Thereupon

Jeremiah J. McCarthy

was recalled as a witness and, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Davis:

Q. Mr. McCarthy, you heard the testimony yesterday of Mr. Antoniacci, did you not? A. Yes, sir.

Q. Did you ever tell a man named Bombara or anybody else for that matter that you sustained your injury by tripping over your own feet in Mrs. Cahill's home? A. No, positively not.

Mr. Murphy: I object to that, Your Honor.

The Court: The jury will disregard that statement.

Mr. Murphy: Your Honor, the paper that we read, as was explained to the jury, that we were not reading it for the proof of what was in there. Now, if we are going into this, we will have to call Mr. Bombara—

The Court: Was that part of the instruction I gave this jury, that they were not to decide whether or not what was said—

Mr. Davis: This is testimony of Mr. Antoniacci, that he talked to Bombara, and from information that
197 Bombara gave him, the plaintiff is alleged to have told Bombara that he tripped over his own feet.

The Court: Now, aren't we getting into hearsay?

Mr. Davis: Well, it should not have come out in the first place, but it is in and this is proper rebuttal.

The Court: Was there any objection?

Mr. Davis: Yes, I vociferously objected.

The Court: All right, let him testify, over your objection.

By Mr. Davis:

Q. Did you ever tell Mr. Bombara or anybody else for that matter that you tripped over your own feet and sustained your injury? A. Positively not, no, sir.

Q. Now, as to your education, Mr. McCarthy, what formal education if any have you had? A. Well, I was in the Navy when I was 18 years old. I have two years high school, and I did 21½ years in the Navy.

Q. You had two years of high school? A. Yes, sir.

Q. You didn't even finish high school? A. No, sir.

Q. Have you had any college training? A. No, sir.

Mr. Davis: That is all.

198 Cross Examination

By Mr. Murphy:

Q. Mr. McCarthy, what rank did you hold in the Navy? A. Chief Petty Officer.

Q. In electronics? A. I was a Chief Musician, and when war was declared, they moved me into electronics because I had been all my life, ever since I had been a kid in school, I had been fooling with radio.

Q. And you went to a Navy school in electronics, did you not? A. No, sir.

Q. They gave you a Chief Petty Officer's rating without any examination? A. I was called Chief Musician, and I was in the Navy until war was decleared, and at that time I was acting as the leader of the United States Navy Band, and they moved me into electronics.

Q. Where did you get your training in music? A. Well, I studied with different teachers from the U. S. Marine Band and so forth.

Q. Mr. McCarthy, is it your recollection of yesterday's testimony that Mr. Bombara told Mr. Antoniacci that you tripped over your own feet? A. That's what he said.

199 Q. Is that your recollection of what was read? A. Yes, sir, tripped over my own feet.

And that is not so.

Q. Mr. McCarthy, I am going to read to you a paragraph out of Defendant's Exhibit 3 and ask you whether this refreshes your recollection as to what the testimony was yesterday, reading from page 2.

The Court: Was this the memorandum prepared by your client?

Mr. Murphy: Yes, Your Honor.

The Court: To the insurance company?

Mr. Murphy: That is right, sir.

At this point we are only testing Mr. McCarthy's ability to remember what was said.

The Court: Very well.

By Mr. Murphy:

Q. Immediately upon contact with the claimant, I was advised by him that he is a personal friend of Mrs. Cahill, being a very personal friend of her son, who is a Roman Catholic Priest. Also that he, Mr. McCarthy, does all the electrical sound wiring for the Roman Catholic Churches throughout the Washington Archdiocese. He states that he has no thoughts whatsoever as to entertaining a claim of any kind against Mrs. Cahill as he does not feel
200 she was responsible for the accident, and he would do nothing to aggravate or in any way reflect upon her.

In this regard, he advised me that he was to receive compensation from his compensation carrier, the National Surety Corporation, 2001 Wisconsin Avenue, Northwest, Washington, D. C.

He further advised that the report that was filed with his compensation carrier is to the effect that he tripped over his own feet while in the house of our insured.

Now does that refresh your recollection? A. No, sir, I never said I tripped over my own feet. It is definitely known in the hospital and everything that this rug slipped.

Q. Does that refresh your recollection Mr. McCarthy, that yesterday what was said was not that Mr. Bombara

said that you tripped over your own feet, but that you said that?

Does that refresh your recollection now? A. It refreshes my recollection, yes, sir.

Q. And therefore the answer which you gave previously is incorrect, because the testimony you listened to yesterday was not what you said it was? A. It was not. I never said I tripped over my own feet.

Q. Mr. McCarthy, that is not the point of the question. The point of the question is: Can you remember what was said yesterday? A. Yes, sir, I can remember what was said.

Q. Well, what was said yesterday? Who is supposed in this evidence to have said yesterday that you tripped over your own feet? A. The compensation carrier is what I thought.

Q. That was your recollection? A. Yes, sir.

Q. Now, having heard me read again what was read yesterday, does that refresh your recollection that the exhibit says that you said it, not the compensation carrier? A. I know it says I said it, but I never said I tripped over my own feet.

Q. But that is what you listened to yesterday, isn't it? A. Yes, sir.

Q. Now, may I ask one other question, Your Honor? Mr. McCarthy, when you signed Defendant's Exhibit No. 1, this piece of paper which you say was folded over, was it a single sheet of paper or was there any carbons in it?

Mr. Davis: Your Honor, we have been all over this, and it doesn't strike me as rebuttal.

The Court: I think we have been over this. Hasn't he gone over this? I think so.

Mr. Murphy: I am not sure whether this witness answered yes or no.

The Court: Well, do you want to ask him if there were carbon copies in it?

Mr. Murphy: Yes, sir.

The Court: All right.

The Witness: I don't remember whether there was one sheet or two sheets or what it was. I just remember a single sheet as far as I am concerned.

Mr. Murphy: I have no further questions, Your Honor.

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Mr. Murphy: Your Honor, I would like to bring out one point in rebuttal.

The Court: About what?

Mr. Murphy: Whether there were any carbons in it.

The Court: All right, let us bring it out.

Mr. Murphy: May I call Mr. Antoniacci, please?

Thereupon

Gene E. Antoniacci

was recalled as a witness and, having been previously duly sworn, was examined and testified further as follows:

203 Mr. Murphy: Will you mark this for identification?

(The document referred to was marked Defendant's Exhibit No. 9 for identification.)

Direct Examination

By Mr. Murphy:

Q. Mr. Antoniacci, at the time that you presented to Mr. and Mrs. McCarthy the release to be signed, did you put a carbon paper in, and another copy underneath, so you would have two copies of it? A. Yes, sir.

Q. I show you what has been marked as Defendant's Exhibit 9 for identification and ask you whether you can identify that piece of paper? A. Yes, sir, that is a carbon copy of the original release.

Q. Incidentally, what was done with the original of the release? A. The original release was sent to the home office of the company with copies of the draft that had been issued on it.

This copy remained in our file here in the Investment Building.

Q. And it remained in the file until suit was filed? A. Yes, sir.

Q. Then what was done with it? A. I think it was sent to your office, Mr. Murphy.

204 Mr. Murphy: I will offer this exhibit, Your Honor.

Mr. Davis: May I see that, please?

The Court: Are there any questions?

Mr. Davis: I assume the original is No. 1?

The Deputy Clerk: That is correct.

By the Court:

Q. Now, the original release that you have been talking about, is that the one that was sent to the home office? A. Yes, sir, the original was sent to the home office.

Q. And returned here? A. And returned from New York for purposes of this litigation.

Q. So what Mr. Davis has in his hand is a copy of the original? A. Yes, sir, an exact copy. It was made with carbon paper between two sheets.

The Court: All right, you may proceed.

Cross Examination

By Mr. Davis:

Q. Since you apparently had this executed in duplicate, why didn't you give Mr. and Mrs. McCarthy a copy of it? A. We normally keep a copy for our file locally and send the originally to the New York office for their records, and with a copy of the draft we issued.

If Mr. or Mrs. McCarthy had asked for a copy, we

205 would have given them a copy. It is not mandatory with the company that we keep a copy here. We do this only for the sake of containing complete and full records on any of these cases.

Q. And you didn't give them a copy of the signed statement that you took on January 12th, 1961, either, did you?

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Mr. Murphy: I would like to offer Defendant's Exhibit 9 for identification in evidence.

The Court: It is received.

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214 **Charge of the Court to the Jury**

The Court (Sirica, J.): Ladies and gentlemen of the jury, it now becomes the Court's responsibility in this case to instruct you as to the law that should guide you and govern you in your deliberations. Of course, it is your duty to accept the law from the Court and apply the law to the facts in the case.

Now, your recollection of the evidence, and your recollection alone, is what must guide and govern you in reaching your verdict in this case. It is your function and your responsibility in this case, as in every case on which you might serve, to resolve the evidence and arrive at what we might call the ultimate or final facts, and in arriving at the final facts, to apply the law as given to you by the Court as to those facts and to do justice between the parties.

Now, in that connection, you should weigh the evidence in this case, of course, without bias, prejudice, or feeling one way or the other as to either party, if any you might have.

As jurors, you are the sole judges of the facts, and as jurors, you are the sole judges of the credibility of the witnesses. You and you alone must determine which witnesses to believe and to what extent you believe them.

Now, in giving this degree of credibility to the testimony of the witnesses, you have the right to consider the demeanor of the witnesses on the witness stand, their
215 ability to recall the facts and circumstances concerning which they have testified, their frankness or lack of it, their bias or prejudice, if any such is manifest, their interest in the outcome of the case, if any, and all other factors which may appear to be important to you

in reaching your decision as to whether the witness is telling the truth or telling a falsehood.

If you should find that any witness in this case, or anyone who testified on this stand, from the beginning of the trial, has knowingly testified falsely as to any material fact, the truth of which that witness could not have been reasonably mistaken, then the jury is at liberty, if the jury sees fit to do so, to disregard any part of the testimony of that witness or you may elect to disregard all of the testimony of that witness.

Of course, you are not to be influenced by the number of witnesses who have testified for one side or the other and you are not to disregard the testimony of any witness solely as a result of caprice. You are, however, instructed that the testimony of one witness whom you find to be entitled to full credit is sufficient for the proof of any fact and may justify a verdict, even if a number of witnesses have testified to the contrary, if upon the whole case and considering the credibility of the witnesses, as I have explained that term to you and after weighing the various factors in evidence, you should decide that there was a balance of probability pointing to the accuracy and
216 the honesty of that one witness.

You will, of course, not consider as evidence anything which the Court has rejected. For example, when the Court sustained the objection to a question, that eliminates from your consideration that question.

Now, I think counsel mentioned this, and I might elaborate a little bit on it, that opening statements, which you heard at the beginning of the trial by the attorneys on both sides, and closing arguments, which you just heard this morning by counsel on both sides, while they perform a very useful and valuable function and purpose in every case, those statements are not the evidence in the case. The evidence in the case is what the witnesses said from the witness stand, and any exhibits that might be offered and received in evidence.

Naturally, you listen with great care and attention to the opening statements because the attorneys have more or less lived with this case, and the first time the jury and the Court knew anything about this case was when it started the other day. These attorneys have talked to the witnesses before they put them on the stand, and it is perfectly legitimate and proper, because if they didn't talk to the witnesses first, they wouldn't know what kind of question to ask the witnesses. So for that reason, they know more about this case than anybody else, and each attorney has his theory of the case and what he believes the evidence discloses; likewise, in closing arguments, if the attorney for the defendant or for the plaintiff argues to you, in effect, Well, I believe the evidence shows this, or a fair inference to draw from this testimony is this and that.

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Now, you may agree with the attorney for either side on the inferences that they draw or the conclusions they come to from the evidence. Likewise, you may disagree with them. You may draw different inferences and deductions from the evidence that the attorneys did, and if that happens, it is the inferences that the jury draws, or the individual juror draws, from the testimony of the witnesses and the exhibits that must govern.

Likewise, another thing to remember is that when a lawyer propounds a question to a witness, sometimes it is in the form of a leading question on cross examination, hoping to get a favorable answer, of course. For example, if you were trying a murder case or a criminal case, and the prosecutor were to say to the defendant: Isn't it a fact that you killed Mary Brown three weeks ago? Well, that question is not the evidence. You don't decide a case on the questions that were propounded. Naturally, you listen to the question, but what you are primarily interested in is what did the witness say in answer to the question. That is the important thing to remember.

You may elect to believe a witness or you may elect to

disbelieve a witness. That is what we mean when we
218 say, the jurors are the sole judges of the credibility of the witnesses. In other words, whether a witness tells the truth or not, whether a witness exaggerates or not, and these are all matters that the jury must decide.

Now, what is this case all about? I will try to summarize as briefly as I can and as succinctly as I can for you the contention of the parties.

The plaintiff, Mr. McCarthy, as you know, brought a suit against the defendant, Mrs. Cahill, in which he is seeking to recover damages which he claims have resulted to him from a fall which he alleges took place in her home.

Now, in its defense or as part of their defense, the defendant, as part of its defense, I should say, because we are dealing with an individual, but for all intents and purposes, and I think counsel will admit this, the insurance company is really the defendant in this case. The insurance company has written a policy, as you noticed during the trial, and is defending Mrs. Cahill. Some of you undoubtedly have insurance policies yourselves, either on your home or your automobile and if an accident occurs, naturally, that is what you are paying premiums for, whether it is your fault or not, and the insurance company steps in, according to the terms of the policy, they have their lawyer defend you, the lawyer gets the evidence as presented to the lawyer by the adjustor or the investigator, and the case starts, and I am sure you are acquainted
219 with how a case starts.

Now, in its defense, the defendant has introduced a release signed by the plaintiff, which purports to excuse the defendant from any liability for the plaintiff's injuries.

The plaintiff, on the other hand, contends that this release was signed by him as a result of the fraud and misrepresentation of Mr. Antoniacci, the then claims adjustor for the defendant insurance company.

The only issue before you, therefore, ladies and gentlemen of the jury, is whether in fact this release was or was

not obtained by fraudulent misrepresentation. If this release was the result of fraud, then it is of no effect. In other words, you are not to decide whether or not the plaintiff has a good case of liability or not. That may become an issue at some future time depending on what you do with this case.

If you should find that the release was given freely and voluntarily, and the parties knew what they were doing, not as a result of misrepresentation and fraud, as I shall explain that term to you shortly, then, of course, they would be responsible for any act of their own.

Now, the law on that subject is simply this. The representations which give rise to a defense of fraud must be material, that is, they must have a real bearing upon the issue. The representations by which the party is induced to enter into a release must be such that if they had not been made, the party would not have entered into the release or signed the release.

If you should find that there was misrepresentations made in this case, and that these were material, as I have defined that term, then you may take up the question whether they were false and fraudulent. If the false representations were made, and if the person making them knew them to be false, then they were fraudulent. Even if the party making them did not know them to be false, the false representations are also fraudulent if they are made with a reckless disregard for the truth.

Although the fraud and deceit are essential elements for the plaintiff to prove, it is not necessary to prove that any misrepresentations were made from a corrupt motive of gain to the defendant or the insurance company, or a wicked and corrupt motive of injury to the plaintiff. It is enough if a misrepresentation was made, and the person making it either knew it was untrue, or not knowing whether it was true or false, had no sufficient reason to believe it to be true. If such representation was intended or calculated to induce another to act on the face of the

representation in a way to produce injury, and injury actually resulted, then that would be sufficient.

Now, ordinarily in a civil case a plaintiff need only prove a case by what is known as the preponderance of
221 evidence or by the weight of the evidence, that is, the proof adduced by the plaintiff must be more convincing than that produced by the defendant. However, where fraud is the issue, as is the situation in this case, a party relying on fraud must prove fraud by clear and convincing evidence that representations were made. You must prove by clear and convincing evidence that they were material, that they were false, and either known to be false by the person making them or made with a reckless disregard of the truth, that they were intended to induce the action or actions by the plaintiff, and that the plaintiff did act upon them to his detriment.

The term clear and convincing evidence as I have used it indicates a burden of proof which lies somewhere between the usual test in civil cases, namely, by a preponderance of the evidence or by the weight of the evidence, and the stricter standard required in criminal cases, namely, proof beyond a reasonable doubt.

It means that the witnesses to a fact must be found to be credible and that the facts to which they have testified are distinctly remembered and the details thereof narrated exactly and in due order and that the testimony must be clear, direct, weighty, and convincing, so as to enable you to come to a clear conviction, without hesitation, after deliberation, of course, of the truth of the precise facts in issue.

If you should find from them the evidence that is
222 clear and convincing, as I have defined that term to you, that the signing of the release was induced by fraud, as I have defined that term, then your verdict shall be for the plaintiff.

If you should find that the plaintiff has not met this burden in establishing fraud, then your verdict shall be for the defendant.

Now, I believe two or three companies have been mentioned during the course of the trial. One was the compensation carrier, the insurance company that has written the policy protecting Mrs. Cahill, and I think the company—Ellett & Short, is that the name of the company?

Mr. Murphy: That is correct, Your Honor.

The Court: And all three of those companies are corporations; that is correct, isn't it?

Mr. Murphy: Yes, sir.

The Court: Now, the law in that connection is this. The fact that insurance companies are mentioned must in no wise prejudice the jury in the jury's deliberations or your verdict. In a court of justice, such as this, jurors may not discriminate between corporations and natural persons. Both are persons within the eyes of the law, and both are entitled to the same fair and impartial consideration and to justice by the same legal standard.

Now, ladies and gentlemen of the jury, in conclusion let me say this: This issue is a very simply issue.
223 It is not complicated at all. You are not called upon, as counsel told you, to decide whether or not, as if this case were being tried on the liability feature of the case, you are not called upon to decide whether she was negligent or was not negligent. That is not the issue here. She got into the case because of the circumstances which you heard from the evidence.

But you must keep in mind that the paramount issue in this case and the important issue is, the plaintiff has alleged that as a result of misrepresentation, or lying, call it that if you want to do that, which would amount to fraud, that that was the reason that the plaintiff and his wife signed the release, and the check, and endorsed it, and I suppose that accompanied it shortly thereafter. That is the issue in this case.

Now, if you keep your mind on that one issue, you won't have any problem in this case, or any case for that matter, if you keep your mind on the issue.

Now, you approach this matter objectively. You have no feeling one way or the other. You are here to do justice.

What do we mean by that? I was impressed by one of the ladies on the jury, and I won't mention the one I am thinking about, but when the Clerk administered the oath to one of the witnesses, I could almost read her lips following the language of the Clerk—Do you solemnly swear that you will tell the truth and nothing but the truth, etc.

224 Now, that word, "truth" is a very important word in connection with deciding any case. That is the most important word I think, that you have heard in this whole trial, because that is the very reason why all of you jurors are assembled here during this present month. You are the fact-finders. And the obligation which you have undertaken is a very serious and important one.

So what do you do in every case? You try to approach the matter objectively. What are you searching for? You are searching for the truth as to what transpired or occurred in that dining room or living room on the night in question in this case.

Did the defendant, through its representative Mr. Antoniacci, did he say the things that the plaintiffs have indicated he said? Were they mistaken? Were they deliberately twisting the story? Were they telling an untruth?

Now, the Court is not going to indicate how the Court feels about this matter. I could if I wanted to say to you in my charge, I could say, for example, Now, I don't believe Mr. McCarthy; I believe Mr. McCarthy; I believe his wife; I don't believe Mr. Antoniacci or I do believe him.

I could take the testimony of any witness and comment upon the testimony and express my opinion to the jury as to how I personally feel, which I have not done, as you know, and I have not purposely or intentionally

225 indicated to you, the members of the jury how I

personally feel about this case, because, frankly, that is not my function. I am not the fact-finder.

I have told you what I think the law is in this case, and I have asked you to take the law as I have given it to you and apply it to the facts in the case. Obviously, I must have some impression about this case. But I try to charge a jury and conduct the trial by keeping what I hope might be referred to as a poker face, and not let the jury know how I personally feel about a case.

Now, there are over 325, or 300, Federal Judges, like myself, in the whole Federal judiciary throughout the country. Now, this is a very great power that a Federal Judge has to be able to comment upon the evidence and tell the jury how the Judge personally feels about the evidence. But I do not believe that a Judge can sit up on the bench, as I am, and preside over the trial and see that justice is done to both parties, and then in his charge say: Now, I don't believe Mr. McCarthy; or I believe Mr. McCarthy; I don't believe the representative from the insurance company; I believe this much of what he said; and I don't believe that a Judge who is entitled to any respect whatsoever in Court can say these things without at least having some effect upon the jury.

Consequently even though I have the power and the right, if I choose, to do so, and comment upon the
226 evidence, this Court at least does not consciously or intentionally try to convey to the jury any impression that the Court might have as it is charging the jury. I might out of the presence of the jury make comments to the lawyers which you never hear, and you cannot read my mind, I am sure you cannot.

So you must consider this. If the Court, and when I say the Court, I mean myself, if I have during the course of this trial indicated by any questions I might have asked, I don't think I have asked any, but if I have, and if I have indicated any feeling I might have about this case, or you have gotten any impression as to how I personally feel about this case, you must disregard that entirely.

You must decide this case solely on the evidence and the testimony that you have heard here in Court.

Now, in conclusion let me say this: In the final analysis, the trial of every case whether it happens to be a civil case or a criminal case, is simply a search for the truth.

Approach the matter objectively, and when you have arrived at a decision in the case and whatever your verdict is, it must be the unanimous verdict of all 12 jurors.

Now, try to return a verdict to this courtroom, after you have reached a verdict, that will do justice to your oath and to your consciences as jurors.

Now, will counsel approach the bench, please?

227 (Thereupon, counsel approached the bench and the following occurred:)

The Court: Now, Mr. Murphy, do you have any objection to any part of the Court's charge?

Mr. Murphy: No, Your Honor.

The Court: Do you have any request for further instructions, other than those you have already indicated and are a matter of record?

Mr. Murphy: No, sir. The only thing, I think we had discussed the question of reasonable reliance on any representations. I think it is impliedly in the charge.

The Court: I think it is included in the charge. If I get into that more, I may confuse them, don't you see?

Mr. Murphy: I am not contending that.

The Court: Well, I think this jury is going to be able to decide this case because there is a sharp issue of fact, and they know what fraud and misrepresentation is.

Now, do you have any objection?

Mr. Davis: No, I have no objection, except our objections that we have made.

The Court: You are protected on the record as far as any instructions that have been offered and ruled on by the Court.

Mr. Davis: Yes, Your Honor.

The Court: Do you have any requests for further
228 instructions?

Mr. Davis: No, sir.

(Thereupon, counsel resumed their places in the courtroom and the following occurred:)

The Court: Now, ladies and gentlemen of the jury, as you know from your prior jury experience, the first thing, of course, you will do is to elect your foreman or forelady, who will preside over your deliberations and discussions and will give each one of you an opportunity to express your views and conclusions about the evidence.

Now, after you have arrived at a unanimous verdict, and you can only return one of two verdicts in this case, your verdict will be either for the plaintiff or for the defendant.

So when you return to the courtroom, the Clerk will say something like this: Has the jury agreed upon a verdict? And the answer undoubtedly will be, Yes, because you will not return to the courtroom unless you have agreed upon a verdict. If you cannot agree upon a verdict, that is something we will have to deal with later.

Now, if you have agreed upon a verdict, and the answer is, Yes, then he will ask you: Do you find in favor of the plaintiff or the defendant?

If your verdict is in favor of the plaintiff, that will mean, of course, that you will have found that fraud or misrepresentation was exercised or used, and therefore
229 the release will be set aside.

If your verdict is in favor of the defendant, that will mean that you will have found that there was no fraud or misrepresentation. It is just that simple.

Now, at this time the Court will excuse with thanks the two alternate jurors. I am sure both of you realize and understand the reason that you were called for jury duty to serve as alternates. Sometimes during the course of the trial it happens that some regular juror might become

incapacitated, or for one reason or another is sick, and the alternate having heard all the evidence, if that should happen, one or the other of the alternates would be in the position to be substituted for the regular juror who has been excused for that reason. Luckily, everybody looks healthy to me this morning, and I am sure that you will live up to your task in this case and render a proper verdict.

I want to thank the two alternate jurors for their services, and you may return to the jury lounge.

Now, I suggest that before you start deliberating in this case that you go to lunch, and the Marshall will make arrangements for you to be taken to lunch, and today you will get a free lunch on the Government.

(Thereupon, at 12:15 o'clock p.m., the jury was taken to lunch, and after which it started its deliberations in the case, and at 3:00 o'clock p.m. the jury returned
230 to the courtroom and the following occurred:)

The Deputy Clerk: Will the foreman please rise?

Madam Forewoman, has the jury agreed upon a verdict?

The Forewoman: We have.

The Deputy Clerk: Do you find for the plaintiff or the defendant?

The Forewoman: We return our verdict in favor of the plaintiff.

The Deputy Clerk: Members of the jury, your forewoman says you find for the plaintiff, and that is your verdict so say you each and all?

The Jury: It is.

(There was no answer to the contrary.)

The Court: Is there anything further?

Mr. Murphy: No, Your Honor.

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EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS, MAY 26 AND 27, 1966

3 **Jeremiah J. McCarthy**

plaintiff, called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Davis:

* * * * * * * * * *

Q. Will you state your full name for the record? A. Jeremiah John McCarthy.

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Q. Will you give us your age at the present time? A. I'll be 60 this December.

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4 Q. Now, Mr. McCarthy, what is your business at the present time? A. Pardon, sir?

Q. In what business are you in at the present time? A. Electronic sound, sound amplification.

Q. And how long have you been in that business? A. Since 1951.

Q. Prior to starting your own company, incorporating your own company, what other sound firm were you with? A. I was with Shrader Manufacturing at that time.

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5 Q. Now, what are some of your typical clients, Mr. McCarthy? A. Well, Howard University, Catholic University, Georgetown University—most of the universities are our clients.

Q. And what does your work, your sound engineering, consist of? What type of work is that? A. Installation of sound equipment for baccalaureates and commencements and language laboratories, and so forth.

Q. Now prior to this injury that we are about to discuss, this accident, did you do much of the physical work in con-

nection with your business yourself? A. Well, in the early days of the business it was only myself and one other man, so that both of us had to do it all.

Q. Now how long have you known Mrs. Florence Cahill? A. I've known her for many years, I'd say approximately the last 30 years maybe.

Q. And are you familiar with her home, 4646 Hawthorne Lane? A. Yes, sir.

6 Q. Did you have occasion to do any of the sound engineering in that residence? A. Well, after she bought it from Bishop Sheen, she reconstruted it, remodified it, and I at that time put in speakers, and so forth, for her, put in a sound system for her.

Q. What year was that? A. That was 1952.

Q. 1952. Now, directing your attention to December of 1960, did Mrs. Cahill have occasion to contact you just before Christmas of that year? A. Yes, sir, she did. She called and asked if I would procure a Zenith FM radio for her daughter.

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Q. Now pursuant to that request did you procure a Zenith table model radio? A. Yes, sir.

Q. And on or about December 23d, 1960, who delivered it to the Cahill residence? A. I did, sir.

7 Q. You delivered it personally? A. Yes, sir.

Q. Do you recall who admitted you to the residence on that day? A. Positively a maid admitted me to that residence. I was met at the door by the maid.

Q. What time of day was that? A. That was approximately around 4:00 p.m.

Q. After being admitted by the maid did you tell the maid what your business was? A. Yes, sir, and she said Mrs. Cahill was upstairs in the library and that she wanted me to bring it to her in the library.

Q. Had you ever been upstairs in that residence at that time? A. While it was under construction, yes, sir.

Q. That was back eight years previous in 1952? A. Yes, sir, and for television repairs at one time.

Q. Now, pursuant to the maid's direction did you then take the radio upstairs to Mrs. Cahill? A. Yes, sir, I did.

Q. And you made personal delivery of it to her? A. Yes, sir, in the library.

Q. Did you have any discussion as to its cost? A. Well, it cost fifty-six dollars and she gave me a check for
8 that amount.

Q. Now, will you tell us in your own words, Mr. McCarthy, what happened from that point on after you were paid for the radio and made the delivery? A. We just talked for a few moments and then I started on—after I told her I would be on my way—and I started down the steps and when I got to the bottom step that I turned to go out at the turn to go out the door, the rug kicked out from under me completely and I fell forward and struck my head against a table.

Q. Now, when you get to the bottom of this circular stairway that you were referring to to get to the door, that is, the front door of the residence, would you have to turn to your left or your right? A. Turn to the left, as you come down the steps you turn to the left.

Q. And do you recall with which foot you stepped on this rug? A. Right foot.

Q. And approximately what type of a rug was this? A. A scatter rug. I don't know what—

Q. Well, was it circular in shape, rectangular? A. It was rectangular. I would think it was around three by five or three by six feet.

9 Q. A rectangular scatter rug around three by five or three by six? A. Yes, sir.

Q. Where had this been placed with reference to the floor at the bottom of the steps? A. Right on the bottom, right on the floor itself at the bottom of the circular stairway.

Q. Right at the steps? A. Right at the steps; yes, sir.

Q. As you stepped on this rug with your right foot, what was your—you say you were in the act of turning to your left at the same time to go to the door; is that right? A. Yes, sir.

Q. Now, how did you fall? A. I fell forward and hit my head.

Q. Did any part of your body come in contact? A. My shoulder and my head hit the—

Q. You're indicating your left shoulder? A. Yes, sir, right in there (indicating).

Q. And what part of your head? A. Right here, sir right across it.

Mr. Davis: If Your Honor please, if these exhibits may retain the same numbers, I offer at this time the Georgetown Hospital records and X-rays as Exhibit 1. Since these photographic exhibits are already numbered I suggest that they bear the same number already given, 2 through 11.

The Court: Now, just a moment. The records are Exhibit No. 1.

Mr. Davis: Exhibit No. 1 are the Georgetown Hospital records.

The Court: Yes, now the others.

Mr. Davis: And Exhibits 2 through 11 are photographic exhibits.

The Court: Very well.

(Georgetown Hospital Records, were marked Plaintiffs' Exhibit 1, for identification; and Photographs were marked Plaintiffs' Exhibits 2 thru 11, respectively, for identification.)

By Mr. Davis:

Q. Mr. McCarthy, I show you what has been identified as Plaintiffs' Exhibit 2 and ask you if that is the stairway you are referring to? A. That is the stairway; yes, sir.

Q. And does that photograph show the floor on which you had come in? A. This is a partial picture of the floor; yes, sir.

Q. Of course in this photograph there is no scatter rug, is there? A. No, sir.

11 Q. These photographs were taken on November 5, 1965.

Now Exhibit No. 3, is that a picture of the same stairway— A. That's the same stairway.

Q. (Continuing)—showing a little larger area of the floor? A. Yes, sir, this is the floor.

Q. Now, will you hold that up and exhibit that to the jury and indicate where this three by five scatter rug was? A. It was right here parallel to the rug itself, right in this area (indicating).

Q. I show you Exhibit No. 4 and ask you if that also shows the same stairway at the first floor landing? A. Yes, sir, it does.

Q. Does that picture also show the object of furniture against which you fell? A. This is the table here, sir.

Q. You are indicating now the marble table in the right side of the photograph? A. And this is the entrance over here.

Q. You are indicating now the door where you're pointing as the entrance door through which you were admitted; is that correct? A. That's right.

12 Q. I show you Exhibit No. 5 and ask you if that is a view of the same stairway looking down on to the floor? A. That's right, sir.

Q. Showing the same table— A. That's the same table.

Q. (Continuing)—and the floor area on the first floor landing? A. Yes, sir.

Q. Now, Exhibit No. 6, is that a view also looking from up the stairs looking down on to the floor? A. Yes, sir. Yes, sir; that's it.

Q. Exhibit No. 7, is that a view of the same stairway looking down? A. That's right.

Q. As you were descending? A. That is it.

Q. And Exhibit No. 8, is that a view showing the type of circular stairway this is through the entire house? A. That's right, and that's a huge mirror at the base in the basement and this is the stairway.

Q. In the foreground on the right is the floor area— A. Yes, sir.

Q. (Continuing)—on which you fell? A. Yes, sir.

13 Q. Exhibit No. 9, is that the same floor area from a close-up? A. Yes, sir, that is it.

Q. I notice in this, as I have in the previous, a rug on the stairs itself? A. Right, sir.

Q. Was that rug secured, to your knowledge? A. This rug was secured.

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Q. Exhibit No. 10, is that a close-up view of the table against which you fell? A. That is the table; yes, sir.

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Q. Now, with reference to this floor, Mr. McCarthy, will you state to the Court and jury what type of floor it is? A. It's a vinyl tile, to the best of my recollection, and as I fell I naturally screamed a little, and then when I

14 hit my I lost—

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The Witness: All right. This is the floor and this is the stairway and this is the table where I hit. To the left of the stairway as you come down the steps would be the entrance. They had the rug right on this floor here, and when I stepped on it I went down and struck my head against this table.

By Mr. Davis:

Q. Now, as you fell against this table, Mr. McCarthy, did you make any outcry of any kind? A. Yes, sir. Yes, sir, because I was bleeding from the nose and I lost about approximately a couple pints of blood, and this dog was

lapping it up as fast as I lost it.

Q. What kind of a dog was that? A. It looked like a Cocker Spaniel.

Q. Now as a result of your outcry did anyone come to your assistance? A. Well, the maid came to me from somewhere and Mrs. Cahill was upstairs, and Mrs. Cahill then came down the steps, and she says, "I should have never left that rug there."

15 Q. What, if anything else, did she say with reference to the rug and the floor? A. She said that she had just had it done, she had just had the floor done.

Q. What did you understand her to mean by that?

Mr. Murphy: I object to what he understood her to mean by it.

The Court: That calls for a conclusion.

By Mr. Davis:

Q. Did she amplify that by saying, " I just had the floor done"? A. Yes, sir, she said, "I just had the floor done. I just had it polished." And that was the gist of her conversation to me.

Q. Now, what else did she say with reference to this rug? A. She should have never left it there. That's what she said.

Q. Now did the two women, that is, Mrs. Cahill and the maid, after they came to your assistance, what did they do for you? A. Well, they did their best. They took me to a powder room which was just to the left of the entrance as you come in and they helped to wash me up and try and get some of this blood off of me.

16 Mr. Davis: If your Honor please, at this time I would like to offer these photographs in evidence to the jury.

The Court: Is there any objection?

Mr. Murphy: No objection, Your Honor.

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17 By Mr. Davis:

Q. Mr. McCarthy, I believe you said you were admitted to the Cahill residence at approximately four o'clock? A. Yes, sir.

18 Q. How much time was consumed in making the delivery of this radio, collecting for its cost and then having this emergency treatment in the form of washing up before you ultimately left the Cahill home? A. I'd say between 30 and 45 minutes.

Q. So you had left the residence then at about quarter of 5:00? A. Yes, sir.

Q. Where did you go from there? A. I went to my home.

Q. Now how were you feeling at the time you did arrive home? A. Well, my shoulder was paining me quite a bit, and when I arrived at my home I had a member of an electronic firm who always comes out around Christmas time to see us, and he was there and he said, "I better get you to a hospital." So he took me to Georgetown Hospital.

Q. Incidentally, what is the distance from 4646 Hawthorne Lane, Northwest, to your home at 4549 MacArthur Blvd.? A. About a mile.

Q. About a mile. Did you have any difficulty in driving that distance after leaving the Cahill residence? A. Well, I drove mostly with my right arm, automatic shift, so—

19 Q. Now, how long after arriving at your home was it when this electronic friend drove you to Georgetown Hospital? A. About ten minutes.

Q. And you proceeded immediately to Georgetown University Hospital? A. Yes, sir.

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26 Q. Now, going back to the happening of the accident itself, Mr. McCarthy, was any warning given to you by either this maid or by Mrs. Cahill such as,

27 "Look out for that rug at the base of the steps? A. No, sir. No, sir.

Q. Did you have any advance notice that the rug was not secured to the floor? A. No, sir.

Q. As a result of your stepping on it and your fall, what actually happened to the rug? A. It slid right out from under me.

Q. Do you know where it finally wound up? A. No, I don't. As far as I know, it just went from under me. I went down so fast and so hard that—

Mr. Davis: I think that is all. You may cross-examine.

Cross Examination

By Mr. Murphy:

Q. Mr. McCarthy, would it be a fair statement to say that you knew Mrs. Cahill for a long time, and that you were both members of the same parish, and that you had known her for a number of years, maybe ten, twelve years, maybe fourteen years? A. Oh, yes, sir.

Q. On the occasion that she called you and asked you to get this radio for her, did you sell these radios? A. No, I procured it for her.

Q. And do I understand that you did this as a favor for Mrs. Cahill? A. Yes, I did.

Q. And it was strictly—you didn't make any profit out of it, it was just— A. It was something I wanted to do for her, period.

Q. You were friends for a number of years and she asked you to do a favor for her and you did it? A. That's right.

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Q. Now, you got your injuries as you fell against this table that appears in the picture; is that correct? A. That's right, sir.

Q. And after you had fallen against the table and gotten your injuries, what, did you sink to your knees? A. I fell to the floor.

Q. In front of the table or to the side of it? A. As far as I recollect, to the front of the table, just went down.

31 Q. Right in front of the table? A. Yes, sir.

Q. Did you sprawl underneath of it? A. I couldn't tell you how I sprawled or not. All I know is I was on the floor.

Q. But you got your injuries as you struck the table? A. That's right, sir.

Q. Do you remember what the weather was like on the day you brought the radio? A. It wasn't raining as far as I can recollect. It was cloudy, but it wasn't raining.

Q. Did you have on some rubbers? A. Well, if it wasn't raining I wouldn't have rubbers on.

Q. Sometimes when it is cloudy cautious people put on their rubbers, Mr. McCarthy.

Do you remember whether you did or you did not have your rubbers on? A. I didn't wear any rubbers.

Q. What sort of shoes did you have on? A. The same type. I've been wearing the same type of shoes for years and I have them on right now.

Q. Well, this doesn't help us any.

32 What type of shoes are they? A. Leather—leather.

Q. Now, you were admitted into the house, you say, by the maid? A. Absolutely by the maid.

Q. And what conversation did you have with the maid? A. I told her I had this radio for Mrs. Cahill and she said, "Go upstairs." Mrs. Cahill was upstairs, and—

Q. Were you acquainted with the maid? A. No, sir.

Q. The maid didn't know who you were then other than that you were delivering a radio? A. That's as far as I recollect.

Q. But she told you to go upstairs in the house? A. She must have known that I was expected, because I told Mrs. Cahill I was bringing her the radio that afternoon.

Q. Did she give you any instructions as to where to find Mrs. Cahill? A. She said she was upstairs and she was in the library.

Q. Did the maid tell you that, or is that what you found out when you went upstairs? A. That's what I found out when I went upstairs.

Q. It is your recollection the maid opened the door, you said you had a radio for Mrs. Cahill; she stepped
33 aside and said, "Mrs. Cahill is upstairs."? A. As far as I recollect, that's right, sir.

Q. The upstairs is the bedroom portion of the house? A. No. As far as I know—I don't know how the layout of the bedrooms—all I know is that I went up the circular stairway and there's a library den at the top of the stairway and that's where Mrs. Cahill was.

Q. You are not acquainted with any of the other rooms on that floor? A. Not necessarily so.

Q. Were you announced at all to Mrs. Cahill by the maid? A. I couldn't give you a definite absolute answer on that.

Q. You don't recall whether the maid went up the stairs with you? A. She didn't go upstairs with me. I know that.

Q. Where did she go after she had admitted you? A. She went—as you would go down from that room, she went to the left. In other words, as you go up the stairway she was in the hallway and she went to the left. And that's where she came out of after I fell.

Q. That room that she went into, this room to the left at the bottom of the steps, is a formal living room, is it not? A. It's a dining room area as far as I can remember.

Q. Did you have any difficulty when you stepped on
34 this small rug on the way up the stairs? A. No, sir.

Q. What was different from the way you walked when you came down the stairs as against when you stepped on it on the way up? A. I couldn't tell you what was different. All I know is that I didn't fall going up the steps; I fell on the way down the stairs.

Q. But you feel that you walked with care in both instances? A. I usually try to.

Q. The first time you did not fall when you stepped on it? The second time you did fall? A. When I was coming down I fell, yes, sir.

Q. It is your recollection your manner of walking was the same? A. As far as I know; yes, sir.

Q. When you were having this conversation with Mrs. Cahill, could you see her all the time while you were discussing? A. No, sir; no, sir.

Q. Well, would you agree with me that it is a normal thing even when one can't see a person that one is talking to, you usually turn toward them, don't you, as you talk, even if you can't see them? A. Well, I wouldn't
35 know. She was upstairs and I wouldn't have any reason to be turning to her. I was coming down the steps, and all I remember saying was, "Merry Christmas" and I stepped on this rug and that was it.

Q. She was above and sort of behind you? A. At the top of the circular stairway.

Q. And that would be off to your right as you were going down? A. Going up, straight up, practically overhead.

Q. It's practically overhead maybe, Mr. McCarthy, but as an actual fact it would be to your right slightly, would it not, and slightly behind you as you get to the bottom of the steps? A. Not behind me. As you come around that stairway she's here at the top of the stairway and the stairway makes a circular bend down underneath, so she wouldn't be behind me.

Q. A person standing on the upstairs landing would be behind the railing. The railing of the top stairs is in line with the bottom of the bottom stairs, is it not? A. The railing would be practically overhead.

Q. And it's your recollection you were looking down the steps as you were talking to Mrs. Cahill, though she was above you and to your right? A. She was above me as far as I know. I wouldn't say right or left.

36 Q. Did you have your hand on the bannister as you walked down the steps? A. Not that I recollect; no, sir.

Q. And as you got to the bottom of the steps where were you with regard to the steps? Were you to the right side

of them, to the middle or left side of them? A. I would say I was in the middle of the steps or more to the right side. I come down more towards the railing side.

Q. And did you step immediately right on to this throw-rug that was there? A. As far as I recollect.

Q. And you stepped with your right foot as you started to turn to go out of the door, is that not correct? A. That's right.

Q. And it slipped out from under you and you went forward? A. That's right; that's right, I did.

Q. And you struck your face and your shoulder against this table which was opposite the stairs? A. That's right, sir.

Q. And as you stepped forward with your right foot and stepped forward your right shoulder was against the table, was it not? A. No, sir, I slipped with my right foot,

37 my left shoulder was towards the table.

Q. You had already commenced to turn to the left, had you not? A. That's right, but I hadn't made much of a turn before I went down.

Q. But you said you had commenced your turn to go out at the left? A. I was going to go out to the left.

Q. Are we now going straight down?

It is my recollection you testified for Mr. Davis that you had started to turn. A. I was going to turn to the left to go out the door. That's my recollection.

Q. Now, you hadn't made any turn at all? You were going to turn but you hadn't made any turn at all? You were still going straight towards the table? A. I was coming down the steps.

Q. And as you got to the bottom with your right foot you were still walking directly right to the table? A. As I was coming down the rug went out from under me and I fell forward in my left. No, I—

Q. You were on your right foot intending to turn to the left—right? A. I'm trying to tell you as I re-

38 collect this. This is five years ago—

Q. I agree with you, Mr. McCarthy. A. (Con-

tinuing)—and I'm trying to tell you, but you're turning a lot of words, but I'm trying to tell you what actually did happen.

Q. And I'm trying to find out exactly what happened, Mr. McCarthy, because you were the only one who was there. A. Yes, sir, and I'm telling you the absolute truth about this.

Q. All right, fine. Now to Mr. Davis you said you had started to turn to the left? A. That's right.

Q. So then you had started to turn? You were not going to start, you had started? A. I must have started to turn, right.

Q. So you had started to turn to the left to go out the door. The table is immediately in front of you over this way; is that not correct? A. The table would be towards the front of me. right; that's right.

Q. And the rug slipped out from under you and you went against the table? A. I can't tell you whether the rug slipped out from under me or sideways or not.
39 All I know is that the rug went out from under me.

Q. And you fell against the table? A. And I fell against the table.

Q. And you don't remember that it went straight out from you? A. A I couldn't tell you which direction that rug went. All I know is that I went down.

Q. Don't you recall when Mr. Davis asked you what happened, you said that the rug skidded out from under you and you went forward? A. I went—I did fall forward.

Q. So you're standing there on your right foot on the rug— A. That's right, just as you've done.

Q. (Continuing)—half turned to the left? A. And you slip there and watch and see if your left side don't fall forward—sidewards.

Q. I'm on my right foot, Mr. Cahill— A. But you try it.

Q. But you show me how you'd slip and have your left shoulder hit the table.

(The witness left the stand.)

A. When I went to turn the rug went out from under me and I fell forward and hit—

Q. When your right foot fell out from under you?

40 A. Yes, sir.

Q. It didn't hit the step, did it? A. I don't remember. All I know is that the rug went out from under me and I hit this table with my left shoulder.

Q. So what you did was sort of turn under so that you could hit the table this way (demonstrating)? A. Well, all I know is that I hit the table and broke my shoulder.

Q. But you turned in mid air, didn't you? You had your right shoulder to the table as you started to fall? Is that not correct? A. Just say that over again.

Q. You had your right shoulder to the table as you started to fall? A. I told you when it went out from under me by left shoulder was toward the table, as far as I can remember.

Q. Mr. Cahill— A. I had to hit my left shoulder because that's—

Q. Well, stop and think about it for a minute now. I don't want to confuse you.

You were coming down the steps and you stepped with your right foot on the rug, according to your testimony, and had started to turn to the left. A. That's right.

41 Q. The table is in this direction, is it not? A. The table was forward, like this. Here's the rug.

Q. Now, take it from me, Mr. McCarthy. I'm the one who is demonstrating your movements at the moment.

Where would the table be in relation to me at the moment? A. Right where that chair is.

Q. Right there? A. Right there.

Q. That's your recollection? A. As far as I know; yes, sir.

Q. I show you what has been identified as Plaintiffs' Exhibit No. 7 and ask you whether that represents, as you've previously testified, where the table was? A. I don't know whether that's the exact position of that table

because that's five years ago. The table could have been moved since this picture, but the table was in this area right here.

Q. But you just told me that the table was around to the left where you were going out the door? A. The picture says where the table is.

Q. You agree that that shows where the table was? A. That's right, the table was there.

Q. All right. Mr. McCarthy, follow with me.
42 you're coming down these steps. A. That's right.

Q. You step with your right foot there? A. That's right.

Q. And yet you broke your shoulder, represented by my left finger in this demonstration? A. My left shoulder hit that table.

Q. Yes. I would like to know how it did it. A. I don't know. I'd like to know, too.

Q. But now you recall that the table wasn't to the left, it was in front of you? A. The table was in that area, I'd say.

Q. Then the table wasn't where this chair is in relation to me? A. I told you just as it is there, the table was in that picture, and I don't know the exact position, but I know I struck it.

Q. Then when you said a minute ago that this chair was in the position where the table was in relationship to me, that was not so? A. I wouldn't say that. I wouldn't know. As I told you, when this rug went out from under me all I know is that I hit this table and went down fast.

Q. But you know you stepped on your right foot?
43 A. And I don't know which way the rug went or anything. All I know is that the rug went out from under me, period.

Q. All you really know, Mr. McCarthy, is the rug wasn't in the same position after the fall, isn't that correct? A. I couldn't tell you where the rug was after the fall.

Q. You don't really know how you fell, you just know—

A. I do know that the rug went out from under me; yes, sir, I'm telling you.

Q. And it went out from under your right foot? A. Yes, sir.

Q. Will you demonstrate for me how you got your left shoulder into this thing again? A. I was coming down the steps like this (demonstrating) and a rug goes out from under me, I can fall forward and smash this way. I don't know which way that a table would be, but if a rug goes out from under you, you can't control which position you will hit, right or left.

Q. Where was the rug after you had fallen? A. I told you I didn't know where the rug went to. I went down too much and I was under shock from blood loss, and I couldn't tell you. I couldn't answer that question truthfully.

Q. How do you know it went out from under you then?

A. I know it went out from under me.

44 Q. From a slipping sensation? A. From going down on that, falling as I fell.

Q. Did you see the rug slipping? A. I knew I stepped on that rug and the rug went out from under me.

Q. Because in your normal fashion of walking you observe what you're stepping on? A. That's right.

Q. And you observed that rug the first time you went up the stairs, didn't you? A. I didn't observe that rug necessarily. I did know that I stepped on it coming down.

Q. You don't know whether you stepped on it going up? A. I imagine I would have stepped on it. I had to step on it if it was there.

Q. And so had anybody else in that house that went up and down those stairs as long as that rug was there, didn't they? A. I couldn't tell you that, whether anyone else. All I'm telling you—

Q. How wide was the rug? A. I didn't measure that rug. I would say approximately the rug was three by six feet.

Q. And the three feet was the side that was extend-
45 ing out from the stairs; is that not correct? A. That's what I would say.

Q. Therefore, if someone were to go up the stairs without stepping on the rug they would have to jump three feet across to the first riser; is that not correct? A. I wouldn't—

Q. Pardon? A. I'm trying to get your question.

Q. I'm just trying to establish the fact, Mr. McCarthy, that anybody going up and down those stairs in that house would have stepped on that rug? A. I imagine they would have, yes. It just happened it slipped out from under me, and she said she had just put it there, and she said, "I ought not to have put that rug there."

Q. What else did she say? A. Well, she was apologizing, that's all, and she did her best to get me cleaned up, and—

Q. It was the normal effusive conversation between somebody when they are attending somebody that's just been hurt—right? "Sorry you hurt yourself. Are you all right? Can I do anything for you?" A. The first thing she said was, "Are you all right?" Well, that's as far as I know.

Q. And it was her home and she was apologizing
46 you had fallen and all this? A. That's right, sir.

Q. And you remember about the dog, do you? A. Definitely.

Q. Where did the dog come from? A. I couldn't tell you where the dog come from. I didn't notice where the dog come from, but I know the dog appeared and was lapping up the blood.

Q. What conversation did you have with Mrs. Cahill after you were taken to this powder room to be given first aid, shall we say? A. There wasn't much conversation. I'll tell you I was in no condition for conversation.

Q. But you remember all of the conversation at the foot of the stairs? A. Just about all I remember was that exclamation that, "I should not have put that rug there."

Q. There was more conversation than that, wasn't there, Mr. McCarthy? A. Pardon?

Q. There was more conversation that that at the foot of the stairs, wasn't there? A. There wasn't much conversation because I wasn't in any mood for a conversation.

Q. Now you tell me again what was said at the
47 bottom of the steps? A. As she came down the steps she said, "I should not have put that rug there." That's the gist of the conversation.

Q. Well, let's not slide by with the gist of something. A. Then that was the conversation.

Q. There was no more conversation at the foot of the steps? A. Not as far as I remember.

Q. Do you remember that on direct testimony you gave us more conversation that that? A. In what way?

Q. We had some testimony about conversation relating to, "I had just done the floor that day." A. She did say that. I know that.

Q. All right. Now what else do you recall was the conversation at the bottom of the steps? A. Just as far as I know it was just that, "I should not have put that rug there." And she said, "I just had this floor done today and I should not have put the rug there." That's all I can remember.

Q. Was there any other conversation? That's all you can remember? A. That's about it.

Q. Didn't you tell Mr. Davis that she also told
48 you that what she meant by having done the floor that day was that it was polished? A. Well, she did say—

Q. She did say that, too, but you couldn't remember when I asked you? A. Just said she had the floor done. That was—

Q. This is all you really can remember, that she had the floor done recently? A. That's right.

Q. Isn't the exact wording you used in the first time you said it that she said, "I had just had the floor done."? A. That's what she said, "I just had the floor . . ."—

Q. She didn't say anything about that— A. (Interposing) "I should not have"—"I should not have put the rug there," she said as she came down the steps.

Q. She didn't say anything about having done the floor that morning, did she, Mr. McCarthy? A. Not the morning that day.

Q. What she said was, "I have just had the floor done." —is that not correct? A. As far as I remember.

Q. She didn't say anything about polishing the floor, did she? A. She said, "I had the floor done." And as
49 far as I remember she said she had polished it, but I'll tell you frankly I had been under such shock that day, that evening, I'm telling you exactly as I remember it.

Q. I understand that, Mr. McCarthy, but you are not under shock now, are you? A. No, sir.

Q. All right, now did she or did she not say to you that she had polished the floor? A. I understood her to say that she had the floor done.

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53 Q. And you came down these stairs and around this way and your fall occurred down here? A. Right, sir.

Q. And during all this time you were coming
54 down the stairs were you looking faced down the stairs or were you looking back at Mrs. Cahill part of the time? A. I wasn't looking back. I was watching, trying to watch, as I usually do when you are descending a stairway, where you, trying to watch the steps.

Q. It is your recollection you didn't have your hand on the handrail? A. Not as far as I recollect; no, sir.

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Redirect Examination

By Mr. Davis:

Q. Mr. McCarthy, one or two on redirect.

55 What was the size—can you indicate by your hands the size of this table model radio you delivered? A. It was approximately this size by this size and about that wide (indicating).

Q. You are indicating about 12 by 8? A. I'd say 12 by 8 by 6.

Q. And do you recall what hand you were carrying that in as you went into the house and made the delivery? A. I remember—as far as I remember I always carry it in the right.

Q. Right hand?

Now this scatter rug that you've described as about 3 by 5, rectangular, to go up those stairs anyone of course would have to step on the rug, would they not? A. Naturally.

Q. And anyone coming down the steps would also have to step on the rug? A. Yes, sir.

Q. Unless they jumped over it, as Mr. Murphy said? A. Yes.

Q. Now anyone stepping on the rug going up the steps, this rug being unattached, would have a—

Mr. Murphy: I object, Your Honor.

56 By Mr. Davis:

Q. (Continuing)—tendency to push it toward the base of the stairs, would it not?

The Court: Just a moment.

Mr. Murphy: Mr. Davis is not only leading his witness, he is putting in a fact which is not in evidence, that the rug was not attached.

The Court: Yes, avoid leading questions. Do not propound questions that simply call upon the witness to verify the statement made in the question asked.

By Mr. Davis:

Q. I show you, Mr. McCarthy, Exhibit No. 3 and ask you to state as a fact if there were a 3 by 5 rectangular rug shown in that picture—

Mr. Murphy: I object, Your Honor.

Mr. Davis: I haven't asked the question yet, Mr. Murphy.

Mr. Murphy: But you are certainly leading him, Mr. Davis. I object.

The Court: Will you approach the bench, please.

(At the Bench:)

The Court: Your question starts off as though it were a hypothetical question. I suggest to you that you rephrase your question.

Mr. Davis: I will rephrase it, Your Honor.

57 (In Open Court:)

The Court: Counsel may proceed.

By Mr. Davis:

Q. Mr. McCarthy, if you had stepped on this rug going up, as you went up the steps, wouldn't that have a tendency to push the rug back toward the base of the stairs?

Mr. Murphy: I object, Your Honor.

The Witness: Towards the stairs.

Mr. Murphy: I object, Your Honor.

The Court: Just a moment. Now when an objection is made, just refrain from answering.

The Witness: Yes, sir; yes, sir.

The Court: It seems to the Court that this is objectionable. It is argumentative and calls for a conclusion of the witness. You can develop any facts you wish to develop. Proceed.

By Mr. Davis:

Q. Now any conversation that you had—I am referring now after the fall—with Mrs. Cahill, was this maid present during that conversation? A. Was this—pardon me, sir?

Q. Was this maid present during any conversation? A. The maid was there when I fell; yes, sir. The maid was there.

58 Q. Mr. McCarthy, that was not my question.

With reference to any conversation you had with Mrs. Cahill after the fall was the maid present during that entire conversation?

Mr. Murphy: I object, Your Honor. He's leading. He knows very well he should ask who was present, not say who was present.

The Court: I think it is not a very prejudicial question. Was the maid there or not, that's all?

The Witness: The maid was there after the fall; yes, sir. She came out when she heard me scream; yes, sir.

By Mr. Davis:

Q. As a matter of fact, I believe you previously testified that it was she and Mrs. Cahill that rendered first aid assistance to you? A. They did; yes, sir.

Mr. Murphy: Objection.

The Court: Now that is not a question. That is a statement of your recollection of the testimony. Just ask questions that elicit answers rather than verification of counsel's statement.

By Mr. Davis:

Q. What I am trying to ascertain, Mr. McCarthy,
59 is whether or not the maid was present during the entire time you were in the Cahill residence?

Mr. Murphy: I object, Your Honor.

The Witness: When I went up the steps—

Mr. Davis: Wait a minute. He's objecting again.

Mr. Murphy: I certainly do object, Mr. Davis. You know a leading question as well as I do.

The Court: He can reframe the question so as to make it not leading. What is the fact as to whether . . .

By Mr. Davis:

Q. What is the fact as to whether or not the maid was present during the entire time you were in the Cahill residence that evening? A. When I went up the steps the maid went back in the area that I thought was the dining room and the kitchen. She did not go up the steps with me. I went up and talked to Mrs. Cahill alone.

Q. I understand, but after you came down the steps and had your fall— A. Then when I fell and screamed, the maid came running out.

Q. Now from that point on, after you had your fall and the maid came running out, was she present at all
60 time until you ultimately left the house. A. Yes, sir.

Q. Then any statements made by Mrs. Cahill would have been made within the hearing of the maid? A. Definitely; yes, sir.

Mr. Murphy: If Your Honor please, I object again. I don't see any reason for Mr. Davis to cross-examine his own witness because he doesn't like his answer.

Mr. Davis: I'm not cross-examining my own witness; I'm redirecting—

The Court: Just observe the rules of evidence. Counsel are well aware of what they are. Avoid leading questions. Proceed to make the record in the proper way. Counsel may proceed.

By Mr. Davis:

Q. I believe you say it was not raining at the time this occurred? A. No, sir.

Q. Was it snowing? A. No, sir. No, it wasn't snowing.

Q. The only thing about the weather that may have been significant was that it was cloudy; is that right? A. Yes, sir.

Mr. Davis: I think that's all, sir. Step down.

The Court: Is there anything further?

61 Mr. Davis: No, Your Honor, not of this witness.

The Court: The witness may step down.

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118 **Florence M. Cahill**

called as a witness by the plaintiffs, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Davis:

Q. Mrs. Cahill, will you state your full name for
119 the Court and jury, please? A. Florence M. Cahill.
Q. Where do you live, Mrs. Cahill? A. I live at
4646 Hawthorne Lane, Northwest.
Q. And how long have you lived at that address? A. Since February, 1951.

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121 Q. Now at that time this home was equipped with a circular stairway, was it not, from the basement all the way up to the roof? A. That's right.

Mr. Davis: May I see Exhibits 2 through 11, please.

(The exhibits were handed to Mr. Davis.)

By Mr. Davis:

Q. Mrs. Cahill, I show you certain photographic exhibits that have been received in evidence, being Plaintiffs' Exhibits 2 through 11, which were taken on November 5, 1965. Will you look at those briefly and tell me whether or not these depict the circular stairway that exists in your home at the present time? A. Yes, that's correct. Some have been taken from above the floor above, and these three I would say were taken right in the hall at an angle. This had to be from above or you couldn't get that view. This was taken from above. So was this. I guess this was right—

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122 Q. Now, Mrs. Cahill, with reference to the floor shown in this picture, will you tell the Court and

jury what the composition of that floor is? A. This floor is known as a vinyl tile floor.

Q. And do you recall now, in 1966, as to when you had that type of floor installed in your home? A. Yes. It was installed in the month of December shortly before Christmas. It was a replacement for the same type floor that was on when I bought the house, but the original floor had become a little cracked or discolored, and I replaced it for appearance sake.

Q. In other words, when Bishop Sheen owned the home he had the same type floor, a vinyl tile? A. Well, it may not have been vinyl in those days, but it was, as near as I recall, the same pattern exactly, and it needed replacement because it had gotten somewhat shabby.

Q. Discolored and worn? A. Discolored, yes.

Q. So you replaced it in December of 1960 with this vinyl tile? A. That's correct.

123 Q. Now, in some of these photographs there is depicted what appears to be an Italian marble top table. How long have you had that table? A. Well, I didn't have it when I moved in the house, and I purchased it at an auction. Well, I just can't recall. I probably have had it about, well maybe—

Q. This is '66. A. Yes, but the accident happened in 1960.

Q. '60, that's correct. A. So I probably had it about a year or two before.

Q. Before the accident? A. Before the accident.

Q. And have you had it positioned or placed in approximately the same place in the hallway since you've owned this table? A. Yes.

Q. That is, at the foot— A. It has never been any other place.

Q. Now, Mrs. Cahill, let me go back for a moment. In addition to the work this small contracting company did before your family moved in, did you have any sound

engineering done in the home, such as installing a hi-fi set or anything of that kind? A. Yes.

124 Q. And who did that work? A. Mr. McCarthy.

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Q. Now, what particular work did he do with respect to sound engineering in your present home before you moved in? A. I asked Mr. McCarthy to come and see the way Bishop Sheen had loudspeakers from a Victrola—it could be controlled at a room which was known as his study, which we use as an upstairs sitting room, and Mr. McCarthy had to connect all the wires from this Victrola through to four separate loudspeakers in four separate rooms.

Q. Do you recall approximately the date that was done? A. Well, it was done before we moved in, and I rather think it was in December of, or possibly January—no, December of 1950 and January of 1951. Anyway it

125 was prior to moving in, and then Mr. McCarthy had to come back and connect it up when all my furniture was moved into the house, but I didn't have the Victrola, as we called it, in that room until I actually moved, but the wiring for all these speakers, that work had to be done prior to the connection—that was just the final connect-up so we would have the controls.

Q. So when Mr. McCarthy did this work either in December of 1950 or January of 1951 the house was actually unoccupied? A. That's correct, but we had to have the heat on for the carpenter, contractor, to work in the house, and so Mr. McCarthy was able to get in and out.

Q. By the same token, when Mr. McCarthy did this work I assume the floor on the first floor, I'm referring to now, was the same floor that you referred to a moment ago that Bishop Sheen had? A. Correct.

Q. In other words, this new vinyl tile floor had not then been installed? A. No, it had not.

Q. Now, after you moved in to the home, Mrs. Cahill, and coming down now to December of 1960, did you have

any domestic employes or domestic servants in your employ? A. Yes, I had a German girl working for me who was at home that day.

126 Q. What is her name? A. At the time her name was Hannelore Tranker.

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Q. And was she in your employ on December 23, 1960? A. Yes, she was.

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128 Q. Do you know where she is at the present time?

A. Yes. She and I correspond a little bit, but she married a young man, an American, who is now teaching at a college in Winston Salem.

Q. North Carolina? A. North Carolina.

Q. And is she with her husband? A. Yes, she is.

Q. And what is her married name now? A. She's Mrs. James McDowell.

Q. McDowell? A. M-c D-O-W-E-L-L.

Q. When did you last hear from her? A. Only by telephone when she came to Washington to become naturalized and she asked me to be a witness for her, that I had known her the length of time that she required to become a citizen.

Q. What was the date of her naturalization, do you recall? A. I think it was July of last year.

Q. July of 1965? A. Five.

129 Q. And you saw her, I take it, on that occasion?

A. No, I did not see her. I was ill and laid up with an infection from an insect bite that I wasn't allowed to—it was in my ankle and leg and I wasn't allowed to be on my foot or get about. So she sent me some papers which I later took down to whatever the authorities are in one of the government buildings.

Q. Department of Justice? A. Yes, the Department of Justice.

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130 Q. Well now, pursuant to that request that you made of Mr. McCarthy did he obtain for you an FM Zenith type table radio for your daughter? A. He did.

Q. Were you at home on December 23d, 1960, when he personally delivered the radio to your home? A. Yes, I was.

Q. Do you recall at this time where in the home you were at that very movement when he made the delivery, when he appeared at the front door? A. Mr. McCarthy telephoned to see if it was all right to deliver the radio that afternoon and I was at home, and I think I let him in, although my maid was there and I know she was in the kitchen at the time of the accident, but I think I let Mr. McCarthy in myself.

Q. You are not sure of that, though? A. No, I am sorry I'm not quite sure. I think I did.

Q. Did your home, or does your home now, or did it at that time have what you might call a den-library on the second floor? A. Yes, it still has.

131 Q. Now, after appearing at the front door—referring to Mr. McCarthy now—with the radio, what is your recollection as to where you asked him to deliver it, to what part of the home? A. Well, as I recall, I said he could just leave it in the front hall and someone would take it upstairs later, and Mr. McCarthy offered to take it upstairs for me, and since it was a surprise Chirstmas present I thought perhaps it was better to have it put out of sight because my daughter was employed and she would be coming home within the hour, possibly, and if it hadn't been taken upstairs she might have seen it sitting there, as it was not wrapped with any wrapping. It was in a carton.

Q. It was in a cardboard box, was it not? A. Cardboard box.

Q. Original container? A. Original container.

Q. And since your daughter was to be the recipient of it as a Chiristmas gift you wanted it kept out of sight? A. Well, I thought it more advisable, but I thought someone

in my family would have had a chance to take it up. I didn't insist on Mr. McCarthy taking it up but he offered to.

Q. Had Mr. McCarthy ever been on the second floor of your home after your family moved in? A. Oh, yes.

132 Q. I mean up to this time? A. Do you mean prior to the accident?

Q. Prior to December 23, 1960? A. Oh, yes, to make, change the needle on the Victrola and general little small repairs that were necessary from time to time.

Q. Now, referring back to this specific date of December 23, 1960, irregardless of whose suggestion it was to more or less secrete the radio on the second floor of the den-library, Mr. McCarthy did take it up to the second floor, did he not? A. That's right.

Q. And did you go up to the second floor with him? A. Yes, I did. I'm quite sure I led the way up the stairs.

Q. You showed him where you wanted to hide it, so to speak? A. That's correct.

Q. And you did put it in the den-library, did you not? A. Not really because I have a little inclosed sun porch off of the master bedroom and my daughter didn't go out there very often so Mr. McCarthy finally put it more or less in a little corner of that room for me. It only took a couple of minutes.

Q. Now you knew at that time, did you not, Mrs. Cahill, that Mr. McCarthy was not in the business of sell-

133 ing FM-AM radios? A. Well, I knew he was not in the retail business because he had been—we knew Mr. McCarthy in a business and social way—why I just contacted him to ask him if it was possible to get one for me.

Q. In other words, he procured this for you at your request, more or less as a favor for an old acquaintance or friend? A. I suppose you would call it that.

Q. After making the delivery of the radio to the second

floor den-library, did you ask him the cost of the radio? A. We, I think, settled that by telephone before.

Q. At any rate, did you write him a check for whatever the cost was settled for, as you say? A. I was in the habit of paying for anything like that at the time, yes. That was the first time Mr. McCarthy ever purchased anything for me. The other times it was always a service he rendered.

Q. Well now, do you recall specifically writing him a check for approximately $56 in payment for this radio? A. I recall having paid for it but whether it was that same day I don't remember.

Q. Well, you paid Mr. McCarthy, did you not? A. Oh, of course, but I don't recall whether I did it that same day, but more than likely I did.

Q. Now after making delivery of the radio and
134 receiving payment for it, did you walk back down from the second floor to the first floor in seeing Mr. McCarthy off? A. No, I stood at the head of the stairs and we chatted a little bit as he was leaving.

Q. Were any amenities passed, such as, "Have a merry Christmas," or anything of that kind? A. I can't recall the exact conversation, but more than likely.

Q. What was the next thing you recall? A. Well, I remember seeing Mr. McCarthy almost all the way down the stairway and turning back and then hearing the sound that a man of his size would make when he fell to the floor, and I had only taken a step or two away from the stairway and I immediately went back to see what had happened, and Mr. McCarthy was just raising himself to his feet and holding his left shoulder and somewhat groaning.

Q. In other words, as I understand your testimony, you heard what you might describe as a thud, is that it? A. That's correct.

Q. Now, prior to hearing the thud, or simultaneously

with hearing the thud, did you hear an outcry or a scream made by Mr. McCarthy? A. Oh, no.

Q. After hearing this thud, what did you do?
135 A. I came to the top of the stairs and started to come down and Mr. McCarthy was getting up on his feet, as I recall, and my maid heard the thud and she rushed out from the kitchen into this main hall and we tried to assist Mr. McCarthy to the best of our ability.

Q. The maid was in the kitchen at that time? A. Yes.

Q. And apparently having heard the thud she rushed out of the kitchen and arrived at the scene about the same time you did? A. That's correct.

Q. Now what was Mr. McCarthy's physical appearance when you say he was attempting to pick himself up? A. Well, he had an expression of pain on his face and holding his shoulder, like this, and as I recall, Mr. McCarthy had a nosebleed, and he had a handkerchief and he was catching the blood in his handkerchief, and I said that we had a little first-floor lavatory that he could go into and take some running water, and the maid went in there to the door, and Mr. McCarthy ran—I don't know—hot or cold water—I don't know which—and I had a box of tissues, Kleenex, handy, and I offered them to him and he used those until he was—

Q. Was the maid, Miss Tranker, assisting you in that process of helping him stop the flow of blood with
136 Kleenex? A. Yes, she was. She was, as I recall, a little bit more into the lavatory where the door was open and assisting him, and I was standing right beside him.

Q. Mrs. Cahill, did you have a family pet at that time? A. A dog—we have always had a dog. I believe we did.

Q. Did you have one on December 23, 1960? A. Yes. I did.

Q. Now what breed specifically was that dog? A. The dog is known as an English Springer Spaniel.

Q. English Springer Spaniel.

Now, during the course of more or less administering first aid to Mr. McCarthy after this fall, did you see this English Springer Spaniel at any time near Mr. McCarthy? A. Well, the dog stayed out quite a bit, but she may have been in the house at the time. I don't recall. It was snowing, you know, and she goes out in the snow, and the dog is not living now. She's been dead since—

Q. Well specifically, Mrs. Cahill, do you recall the dog attempting to mop up, so to speak, or lick up any of the blood that Mr. McCarthy had lost and either you or the maid chasing the dog away? A. Well now that you remind me of it, she may have. The dog may have done that, but I was perhaps a little concerned about Mr. McCarthy's injury.

137 Q. Now, Mrs. Cahill, as I understand your testimony then, you did not actually witness the fall; you heard the thud and then you came down; is that correct? A. Well, I can't quite recall whether I—

Q. I mean you didn't actually eyewitness his fall? A. Well, we discussed it so much that I maybe have like a mental picture that he missed his step is what Mr. McCarthy seemed to say, so I would call it that he missed the bottom step.

Q. Did you ascertain that in the course of his fall that his head particularly and his shoulder had come in contact with any item of furniture? A. Well, the table that was there, I believe.

Q. That you are referring to? A. That table did seem to—being an antique the leg was a little awry after the accident. It had to be straightened out.

Q. He actually struck that side of his face and the left shoulder against that corner of the table, did he not? A. I didn't see him strike anything.

Q. Do you recall Miss Tranker sort of wiping up blood from the top surface of the table? A. No, I don't recall that.

Q. Now, referring to these photographic exhibits, Mrs.

Cahill, and I will take the top one which is Exhibit
138 No. 11, will you state to the Court and jury, on this specific date of December 23, 1960, whether or not this stair carpeting was in position particularly as shown here in Exhibit 9 also? A. The stair carpeting is the same carpeting that was installed in the house when I moved into it as a new carpet, and it is still the same carpet that was there in 1960.

Q. And it is a red color, is it not? A. It is red.

Q. And as shown in these two exhibits, again referring to 9 and 11, that stair carpeting is secured to the stairs, is it not? A. Yes, it is.

Q. By nails? A. That's correct.

Q. On the date of this accident what, if anything, did you have on the floor surface at the bottom of the stairs? A. Well, because of the fact that the floor was newly installed and it was snowing outside I had a scatter-size rug placed on the vinyl floor to catch more or less snow or what would be tracked in on a person's feet. It would save the floor from becoming scratched.

Q. What was the size of this scatter rug that you just referred to, approximately? A. Well, possibly four
139 by four and a half feet in length by three feet wide.

Q. In width? And was that the same color as the carpeting, that is, red? A. No, it was a figured rug and dark and light shades.

Q. Do you recall when you had placed that particular scatter rug at the foot of the steps? A. Well, when the snow started, if it started in the morning, it was placed there that day.

Q. That very same day? A. That day.

Q. It hadn't been there before December 23d? A. No, not if it hadn't been snowing because the purpose of putting it there was to catch the tracking in of snow on anyone's feet.

Q. Now, was this three by four and a half scatter rug attached to the floor in any manner? A. I don't re-

call, but it is my practice to have what is known as a liner or anchor type of material that fits exactly the same size of the rug to secure it to the floor, but it's not fastened to the floor. It's just like an adhesive tape so your feet do not slip on it.

Q. Was that the only scatter rug you had on the first floor level that day? A. I think I had one at the
140 front door to catch the wet on people's feet.

Q. That was on the inside of the house or outside? A. Inside of the house. We call it a vestibule type of entrance hall.

Q. You say you think. Are you sure of that? A. Well, I'm almost sure. Since it's not a permanent practice of having it there, any rugs on that type of floor, I can't be sure.

Q. Now, after hearing this thud and coming down from the second to the first floor, where did you find the rug, the scatter rug I'm referring to? A. Well, in the excitement and concern for Mr. McCarthy, I think that it was sort of shoved to one side of the position it was in, sort of rumpled up, as near as I can explain.

Q. Now, after giving Mr. McCarthy this first aid of stopping the flow of blood, more or less washing him off in the first floor powder room— A. Yes.

Q. (Continuing)—did you have any conversation with Mr. McCarthy as to the rug and the floor surface itself? A. Well, I don't—I may have said that I'm sorry that that rug may have been part of the reason for him missing his step, or something, but I don't recall too well.

Q. Well specifically, do you recall telling him that
141 you should not have left that particular scatter rug at the foot of the stairs? A. I may have said that, but I don't recall that I said it. After six years it's a little difficult.

Q. Did you make any statement to him on that occasion as to just having had the floors done? A. No, I told him that I had the vinyl floor installed and there was a finish

put on the floor at the factory, but they were not waxed by me or by any instructions of mine. It was just a new finish that was on th floor which was a polished finish.

Q. Polished finish? A. No waxing of any—like many people wax floors. I'm opposed to waxing floors because I slip myself sometimes.

Q. Now this particular polish finish on this vinyl tile renders that type of surface rather slippery even when it is dry; isn't that true?

Mr. Murphy: Object

The Witness: Well—

The Court: Just a moment.

Mr. Murphy: Just a moment.

The Court: She can describe the floor. This is an adverse witness. Of course we realize that so there is some leeway givn in the examination on leading questions.

142 I believe I will let the question stand.

By Mr. Davis:

Q. Isn't that true, Mrs. Cahill, that even on this type of vinyl tile floor with this polished finish that you've just described, that floor is rather slippery even when dry? A. Well, the family, myself and my family never slipped on it prior to Mr. McCarthy's accident, and we had gone up and down the stairs ourselves that same day and passed over that rug.

Q. Well, of course you knew it was there, did you not? A. Well, I knew it was there but I don't think I took any particular precaution.

Q. Had you physically placed it there or Miss Trankner that day? A. That I can't quite recall, but I have a man who works for me, too, and I think I asked him to put it there.

Q. Now, do you recall the approximate time that Mr. McCarthy made his appearance with the radio that afternoon? A. I think it was between 4:00 and 4:30.

Q. Now, prior to that time had you had any other guests, friends or neighbors come into the home on the same day?

A. I can't recall any guests, but from my own family, the daughter that lives at home and the daughter that is now married, she was not—the younger daughter for
143 whom this radio was intended, she was not there after she went to work that morning, but the other daughter and myself were the only people, and the maid, to go upstairs and clean, the only people that I recall that could have passed over the rug during the day.

Q. So to the best of your recollection then, Mr. McCarthy was the only guest, business or otherwise, that you had that afternoon? A. I think that's correct.

Mr. Davis: I think that's all, Mrs. Cahill.

Mr. Murphy: I have no questions.

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145 The Court: Well now, what about the schedule of
146 this case? How much have you got? How long will your testimony be?

Mr. Murphy: It won't take any time at all. My witness has testified. We have agreed between us that it will be stipulated the floor was put in about a week before the accident so I don't need to bring the floor man.

The Court: You are not going to put anything on?

Mr. Murphy. I can't get the maid. She is in Winston Salem.

The Court: You will read the stipulation into the record, something of that sort?

Mr. Murphy: Yes, sir.

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147 Mr. Murphy: Thirty or forty minutes I would think, Your Honor, but I would also like to make a motion. I think this case is in the posture to make a motion.

The Court: You may make the motion. You may make it right now. Well, he has not rested. If you just submit your authority I don't think you need any long oral argument.

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149 The Court: I think we have evidence of a general character. It was a loose rug. It wasn't fastened to the floor. It was a place where an invitee would, in the ordinary course of things, make use of it, or step upon it, especially coming downstairs. I think that I would not be justified in taking it from the jury because there has not been a more definite or specific description of the actual composition of the rug. The testimony, in the Court's opinion, raises a sufficient question for the jury rather than a question of law for the Court.

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151 The Court: Your motion is made for a directed verdict on the ground that there is no evidence of negligence which would justify submission of the case to the jury, and as a matter of law you are entitled to a determination that the plaintiffs' evidence would not support a judgment against the defendant. That is your point, isn't it?

Mr. Murphy: Yes, sir.

The Court: I will submit the matter to the jury as a question of fact on the issue of negligence.

Mr. Murphy: Very well.

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178 Mr. Davis: If Your Honor please, I offer at this time a certified copy of the United States Weather Bureau for the month of December 1960 showing particularly the status of precipitation, temperature and sunshine on December 23d, 1960.

Mr. Murphy: May I ask what part of the city it covers?

Mr. Davis: Washington, D. C.

Mr. Murphy: The whole of the city?

Mr. Davis: The whole of the city.

Mr. Murphy: This was taken where?

179 Mr. Davis: National Airport.

Mr. Murphy: I object, Your Honor.

Mr. Davis: It shows right on it "The Local Climatological Data For Washington, D. C. for November, 1960."

(The exhibit was handed to the Court.)

The Court: Do you have objection?

Mr. Murphy: Yes, Your Honor. I think it is perfectly obvious from the last couple of days it can be raining in one part of Washington and not in another.

The Court: Where is that data accumulated?

Mr. Davis: It is accumulated by the U. S. Weather Bureau for the facilities at the National Airport.

The Court: At the airport?

Mr. Davis: Yes, Your Honor.

The Court: The airport is what distance from the location of the house in question?

Mr. Davis: I would say approximately, from my own knowledge of it, about four miles.

The Court: Well, I have recently had occasion to rule on this, and I am constrained to sustain the objection to it on the grounds of the difference in the distance.

Mr. Davis: May we approach the bench on this, if Your Honor please?

The Court: You may.

180 (At the Bench:)

Mr. Davis: I have underlined in red, if Your Honor please, the particular portion. It shows that there had been no snow since December 12th, and on the particular date there had been none whatsoever. There had been an accumulation of approximately one inch on the ground as the result of two snows on the 11th and the 12th, and on the 23d and the day before there was a hundred percent of sunshine. Now, this is offered for the purpose—

The Court: This is precipitation?

Mr. Davis: Precipitation of snow. This is offered for the purpose of rebuttal as against the defendant's testimony that it was snowing on that day.

The Court: The point that the Court had in mind was the temperature. I think the other case we had was temperature. This was not precipitation, it was temperature only.

What have you got to say about this being a record of precipitation? It is your contention that the precipitation is so localized that it wouldn't be admissible?

Mr. Murphy: Certainly. I think we have all experienced it in the last couple of days. You get home from work and your wife tells you it has been raining in Bethesda and it wasn't raining where you were.

Mr. Davis: This is certified as being for the
181 Washington, D. C. area.

The Court: Well, the only question is the difference in the location.

Mr. Davis: But this shows, if Your Honor please, there has been no precipitation by snow whatsoever on that day or for several days before the 23d.

The Court: Precipitation, I am inclined to admit it.

Mr. Murphy: Well, I certainly strenuously object to it. I think the precipitation is the part that is most variable from place to place. The temperature is a general thing because you are dealing with air, but precipitation you can have a shower any place. I think the best evidence of that is the people who are at the location.

The Court: I will admit it.

Mr. Davis: All right.

(Plaintiffs' Exhibit No. 15 was received in evidence.)

(In Open Court:)

Mr. Davis: May I read the pertinent portion of it, if Your Honor please, for the jury?

The Court: You may.

Mr. Davis: Ladies and gentlemen of the jury, Exhibit No. 15 is a certified copy of the Local Climatological Data for Washington, D. C. for December, the whole month, 1960, and on the Statistical Page which is underlined in

red, it shows that for the specific date, December
182 23d, under "Precipitation" there was no precipitation whatsoever, and as a matter of fact there had been no measurable precipitation since December 11th and 12th, and that also for the same date, December 23d, there was 100% of sunshine, as there was for the day preceding, December 22d. At that time there was one inch of snow upon the ground.

Mr. Murphy: If Your Honor please, I would like to make an additional objection now that I hear that that one day is intended to be completely sunny. Mr. Davis is impeaching his own witness. Mr. McCarthy testified that it was overcast and cloudy.

Mr. Davis: This is a matter of argument, if Your Honor please, the exhibit speaks for itself.

Mr. Murphy: No, Your Honor, I don't think it is a matter of argument. You can't impeach your own witness.

The Court: The witness is an adverse witness. I will—

Mr. Murphy: No, Mr. McCarthy, his client, Your Honor, testified that it was cloudy and overcast on the day that he delivered the radio and Mr. Davis contends it was a hundred per cent of sunshine.

The Court: Well, it is a matter that can be argued to the jury. The Court will allow the evidence. The Court will explain to the jury the rulings on the admission of evidence. The Court doesn't pass upon the
183 credibility of the evidence. The Court leaves that to the jury under all the evidence, but on the question of admissibility the Court will overrule the objection. Is there anything further?

Mr. Davis: No, with that the plaintiff rests, if Your Honor please.

The Court: The plaintiff rests.

Mr. Murphy: If Your Honor please, I think the motion, appropriate motion, was taken care of previously.

The Court: Yes.

Mr. Murphy: Mrs. Cahill having testified, the only testimony which the defendant wishes to offer is the stipulation arrived at between Mr. Davis and myself to avoid calling another witness, and that is that the Standard Floor people would say that the floor was installed the week before the accident and that it was vinyl tile.

The Court: I did not hear you.

Mr. Murphy: The Standard Floor Company would testify from their records that this floor in the foyer of Mrs. Cahill's house was installed the week before the accident and that it was vinyl tile.

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184 **Closing Argument By Counsel in Behalf of the Plaintiffs.**

Mr. Davis: Thank you, Your Honor.

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187 You ladies and gentlemen all know that if you have a scatter rug three and a half by four feet at the base of a stairway, when you step on it if it slipped at all it would slip forward into the base of the steps, but when you are coming down the exact opposite process is reversed. When you step on it exactly as Mr. McCarthy said he did, with his right foot, the rug skated out from under him, and then his impulsive act would be to try to regain his balance, but before he could his head and the left side of his face and his left shoulder hit this fine Italian marble table. It had been in the same place, according to Mrs. Cahill, from the time she bought it at auction.

Mrs. Cahill has further admitted the presence of a dog. She even told you the breed of it, an English Cocker Spaniel. She admitted the presence of the maid that we told you about, all directly in line with Mr. McCarthy's testimny. We knew that the maid was of a foreign extraction. We thought it was a French maid but it turns out to be a German maid. However, where is Mrs. McDowell today?

Mr. Murphy: If Your Honor please, I don't believe there is any basis for arguing a missing witness. She is just as available to Mr. Davis as she is to this side.

The Court: That is true.

188 Mr. Davis: I never knew her name until today, Your Honor, and I hear that she was contacted just 1965. Her deposition could have been taken.

Mr. Murphy: It certainly could have by Mr. Davis.

Mr. Davis: If I knew who she was I would have.

Mr. Murphy: Mr. Davis, you know the Federal Rules of Civil Procedure allow you to find a missing witness.

The Court: There is no point in arguing this matter. The missing witness is available on both sides of the case.

Mr. Davis: I am sure I couldn't produce a witness that I knew nothing about until this morning.

Mr. Murphy: If Your Honor please, I object to that line of arguing. He knows very well he is allowed to find out the name of every witness if he wants to.

The Court: Counsel may proceed. The Court has ruled on it.

Mr. Davis: At any rate, ladies and gentlemen, if the present Mrs. McDowell were here she could shed a lot of corroborative light on the factual situation, particularly on this point. Mrs. Cahill again very frankly says she thinks, she thinks she is the one that admitted Mr. McCarthy that day to the house. He tells you specifically it was the maid, and the maid is the one that directed him up to the den-library stating that Mrs. Cahill was at that time 189 up there. There is one point that this Mrs. McDowell could straighten up. She could straighten up on whether she did actually witness this occurrence.

Mr. Murphy: If Your Honor please, may I ask what your ruling is on the missing witness?

The Court: I have ruled on the missing witness. She is available on both sides. The instruction on missing witness is it applies to both parties. Both parties are equally capable of obtaining the names of any witnesses they seek

to obtain by the proper process of law, so the missing witness is not more available to one or the other. The Court will give the customary instruction on the effect of missing witness, but it cuts both ways.

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199 Now to show you—and I don't mean this critically of Mrs. Cahill—I think it's just a question of lack of recollection—but I asked Mrs. Cahill, "Was this the only scatter rug you had, the one at the bottom of these stairs?"—as you can see from the bottom of the photograph. No, she had another one, right inside the front door. You ladies, I assume, are all housewives and you like to keep your floors neat and clean, but if you
200 have one on the inside of the front door, what is the necessity for another scatter rug to keep feet dry or shoes dry under a very type of stairway such as this one? And Mrs. Cahill says she thinks it was snowing. That's an inaccurate recollection because we have shown you from the official records of the Weather Bureau—

Mr. Murphy: If Your Honor pleases, this isn't rebuttal. Nothing was mentioned about precipitation on argument.

The Court: Proceed in an orderly fashion.

Mr. Davis: I am trying to respond to the point made by Mr. Murphy, if Your Honor please.

And the Weather Bureau records will show—

Mr. Murphy: If Your Honor please, I would like a ruling on that. I never mentioned the weather in my argument.

The Court: I have called the counsel's attention to the fact that the argument on close is just to meet the argument of the defendant which has been made.

Mr. Davis: Very well. With that, ladies and gentlemen, you have heard the evidence, as we have all heard from this witness stand. I respectfully submit the plaintiff in this case has borne the burden of proof cast upon him by the law and is entitled to your verdict. Thank you.

201 **The Court's Charge to the Jury**

The Court (McLaughlin, J.): Ladies and gentlemen of the jury, the case upon which you are sitting as jurors is the case of Jeremiah J. McCarthy and Anna Marie McCarthy, plaintiffs, against Florence M. Cahill, defendant. Now the Court will instruct you as to the law in this case, and before doing so the Court will call your attention to the statement made by the Court to the jury at the outset of your duties here in this case. You will recall that the Court called upon you to exercise your concentration in hearing the evidence in the case. Now that applies equally well, ladies and gentlemen of the jury, to the instructions which the Court will give you. These instructions are necessarily somewhat extended because it is the duty of the Court to instruct the jury in every case on the law in that particular case, and regardless of how many cases you may have sat upon as jurors and how many times you may have heard general instructions on questions of law, which are likewise involved in part in this case, it is the duty of the Court to instruct in every case as though it were the only case involved in the entire system. Therefore, ladies and gentlemen of the jury, I will ask you please give your close attention to these instructions. You will find they are not complicated, I believe, but the Court finds that often, or at times, not too often fortunately, after the Court has instructed

202 a jury completely on the law, as the Court intends to do here, the Court receives a note from the jury asking that some particular instruction be repeated, or asking some question which, if the jury had given close attention, would not have been necessary to send to the Court. So the Court will ask you to give your close attention, if you will, please, ladies and gentlemen of the jury.

In the course of these instructions I shall refer to the plaintiffs, whom I have named, as the plaintiffs and to the defendant as the defendant, or I may at times refer to them by their proper names, and may distinguish between

the plaintiffs by referring to Jeremiah J. McCarthy as the male plaintiff and to Anna Marie McCarthy as the female plaintiff.

In this instance there are two actions. The first is an action by the male plaintiff, Jeremiah J. McCarthy, for damages for alleged pain, suffering, injuries, expense and loss of earnings which the male plaintiff alleges he sustained as the result of a fall which occurred, as he alleges, on December 23d, 1960, in the defendant's home. Now the male plaintiff alleges that the fall and his resulting injuries were caused by the negligence of the defendant in allowing a loose scatter rug to lay on a waxed or polished floor at the foot of the steps in her home in an allegedly unsafe manner and in failing to warn him of said unsafe condition.

203 The other action is by the female plaintiff, Anna Marie McCarthy, the wife of Jeremiah McCarthy, based on the same alleged negligence of the defendant for which she, the female plaintiff, seeks damages for alleged loss of services of her husband.

The defendant denies any negligence on her part and asserts that the place where the accident occurred was maintained in a reasonable and proper manner, and further asserts that the plaintiff's injuries, if any, were caused by the male plaintiff's sole or contributory negligence. Defendant also denies that the plaintiff sustained injuries and damages to the nature and extent claimed.

The statement which the Court has just made to you does not of course purport to constitute a statement of the facts as developed by the testimony. It is merely an outline of the allegations or claims of both the plaintiffs and the defendant. Now you have heard the evidence and the arguments of counsel, the attorneys for the plaintiffs and for the defendant, and it now becomes my duty as judge to instruct you as to the principles and rules of law governing the case. It is your duty as jurors to follow the Court's instructions as to the law and to take the law

from the Court. On the other hand, ladies and gentlemen of the jury, you are the sole judges of the issues of fact and you must determine the facts for yourselves
204 solely upon the evidence presented at this trial.

The burden of proof is on the plaintiffs to establish every aspect of their case by what we call a fair preponderance of the evidence. The term "preponderance of the evidence" means such evidence as when weighed with that opposed to it has the more convincing force. A party has succeeded in carrying his or her burden of proof on an issue of fact if the evidence favoring his or her side of the question is more convincing than that tending to support the contrary side, and if it causes you, the jurors, to believe that on that issue the probability of truth favors that party.

You are the sole judges of the credibility of the witnesses. In determining the credibility of witnesses, or in other words, their worthiness of belief, you may take in to consideration their demeanor on the witness stand, their ability to recall the facts, their frankness or lack of it, any prejudice or bias which may be manifested, and any interest, if any, that they may have in the outcome of the case. You are to give the testimony of witnesses such weight as you think it is entitled to, and it is your duty to resolve any conflicts in testimony. In resolving conflicts you do not have to decide in conformity with the number of witnesses. This does not mean that you must disregard the number of witnesses on the opposing side.

It does mean that you are not to decide the issues by
205 the simple process of counting the number of witnesses on one side and comparing that figure with the number on the other side. It means that the final test is not in the relative number of witnesses but in the relative convicing force of all the evidence. If you find that any witness wilfully testified falsely as to any material matter concerning which that witness could not, in your judgment, have reasonably been mistaken, you are then at liberty,

if you deem it wise to do so, to disregard the testimony of that witness, or to disregard any part of the testimony of that witness which you may see fit to disregard.

Now up to this point the Court has instructed you on the law generally applicable to civil actions. I shall now instruct you on the law particularly applicable to the instant case.

In this case, as the Court has stated, the plaintiffs allege that the male plaintiff was injured and damaged as a proximate result of defendant's negligence. Defendant denies that she was negligent in any respect and further denies that she was in any way responsible for any injury or damage which the male plaintiff may have sustained.

Now concerning negligence you are instructed as follows: Negligence may be defined to be the failure or omission to do something which, under the circumstances, a reasonable and prudent person would do, or the doing of
206 something, which under like circumstances, a reasonable and prudent person would not do. It is the absence of the ordinary care which is required according to the circumstances. By ordinary care is meant such an amount or degree of care as a prudent and reasonable person, having a proper regard for one's own safety and the safety of others, would exercise under existing circumstances and conditions, and where known risks enhance the danger, the degree of care is correspondingly increased.

You, the jury, are instructed that no presumption of negligence arises from the mere happening of an accident. Before the plaintiffs may recover they must prove by a fair preponderance of the evidence that the defendant was negligent and that such negligence was the proximate cause of the accident and of any damage which the plaintiffs may have sustained. If the plaintiffs meet this burden of proof, then negligence on the part of the defendant has been established. However, if the evidence is equally balanced, or preponderates in favor of the defendant on this issue of whether or not the defendant was negligent,

then negligence on the part of the defendant has not been established.

By proximate cause, as that term is used in these instructions, is meant that cause which in natural and continuous sequence, unbroken by any efficient intervening
cause, produces the injury complained of and with-
207 out which the result would not have occurred. It is
the efficient cause, the one that necessarily sets in operation the factors that accomplish the injury or injuries. It may operate directly or by putting intervening agencies in motion.

As you have already been told, the defendant denies any negligence on her part and alleges that the male plaintiff was guilty of contributory negligence, and that the proximate cause of any accident and any injury to the plaintiff was the male plaintiff's own negligence or contributory negligence.

Contributory negligence is the same as negligence except that contributory negligence is negligence on the part of a plaintiff rather than on the part of a defendant. If you find that the defendant is not chargeable with any negligence then you will return a verdict in favor of the defendant and need not consider the defense of contributory negligence. It is only in the event that you find the defendant guilty of negligence that you will consider whether the male plaintiff was guilty of contributory negligence. And if you find the male plaintiff to have been guilty of contributory negligence, which caused or contributed to cause the accident, then your verdict must be in favor of the defendant, for one whose own negligence contributes as an efficient cause of injuries will not be permitted to recover damages for those injuries. And the Court
further instructs you that under such circumstances
208 you are not warranted in comparing the negligence,
if any, of the male plaintiff and the defendant, to determine which was guilty of the greater degree of negligence, but if you find from the evidence and under

the instructions of the Court that the male plaintiff was guilty of any negligence which caused the accident in question, then you shall return a verdict in favor of the defendant. The burden is on the defendant to prove contributory negligence on the part of the male plaintiff by a preponderance of the evidence. If the defendant meets this burden of proof, then contributory negligence on the part of the male plaintiff has been established. If the evidence is equally balanced or preponderates in favor of the plaintiff on the issue of contributory negligence, then you are instructed that said defense of contributory negligence has not been established.

It is agreed by the parties in this case that on December 23d, 1960, the male plaintiff was on defendant's premises as a business visitor. You are instructed that one who goes upon the premises of another as a business visitor, at the express or implied invitation of the owner of said premises, is an invitee as was the male plaintiff while in the defendant's home. Toward an invitee the owner of a building or a house, as in this case, is obliged to exercise ordinary care to keep the premises in a condition
209 reasonably safe for the invitee and to refrain from active negligence. However, the responsibility with respect to the condition of the premises is not absolute. It is not that of an insurer. If there is a danger attending upon the entry, and if such danger arises from conditions not readily apparent to the senses, and if the owner has actual knowledge of them, or if they are discoverable in the exercise of ordinary care, it then becomes her duty to give warning of such danger to the invitee. On the other hand, the owner is not bound to discover defects which a reasonable inspection would not disclose, and she is entitled to assume that the invitee will perceive those dangers which would be obvious to him upon the ordinary use of his own senses. The invitee, on the other hand, has a right to assume that the premises he is invited to enter are reasonably safe for the purpose for which the invitation was extended.

Should you conclude from the evidence and under these instructions that the male plaintiff is entitled to damages, then the measure of his recovery would be a sum which will fully compensate him for the damages which you find he has sustained as a proximate result of the defendant's negligence, if so you find.

In ascertaining damages you may take into account the character of the male plaintiff's injuries, any pain and suffering, mental anguish which you may find he has
210 sustained or may in the future sustain. You may also take into consideration the reasonable value of services of physicians and all other expense that the male plaintiff was compelled to incur or will in the future incur as a proximate result of the defendant's negligence. You may also take into account the reasonable value of the time lost by the plaintiff since his injury wherein he has been unable to pursue his usual occupation. In determining this amount, if you find for the plaintiff, you should take into consideration the evidence of the male plaintiff's earning capacity, his actual earnings, and the manner in which he normally occupied his time before the injury, and find the amount he was reasonably certain to have earned in the time lost had he not been disabled. You may also take into account such sum, in addition to the elements of damage herein mentioned, as will reasonably and adequately compensate the male plaintiff for such loss of earning power, if any, occasioned by the injury in question, which you may find from the evidence the male plaintiff is reasonably certain to suffer in the future. In determining this amount you may take into consideration what the male plaintiff's health, physical ability and earning capacity were before the accident and what they are now, the nature and extent of his injuries and disability, whether they are reasonably certain to be permanent in character, or if not permanent, the extent of their duration,
211 all to the end that what loss, if any, male plaintiff suffered in his future earning capacity and the present value of such loss sustained by him.

In this case the female plaintiff, the wife, also makes a claim for damages. You are instructed that if you find from all the evidence and the Court's instructions that the female plaintiff, the wife of the plaintiff, is entitled to recover damages from the defendant for loss of her husband's services, or what is called consortium, you may award her such damages. The basis for awarding her such damages would be loss of services and consortium of the male plaintiff, the husband, if any such loss you find her to have suffered as a proximate result of the negligence of the defendant, if you have found the defendant to be negligent and have found such negligence to have been the proximate cause of injury to the male plaintiff, and if not found that the male plaintiff was contributorily negligent. Now concerning the claim of the wife for loss of her husband's services, or what is called loss of consortium, you are instructed that the services rendered by a husband to a wife often are of such character that no witness can say what they are worth. Often they have no market value equivalent. Hence it is not necessary that there be any direct or express testimony as to the value of the husband's services to entitle the wife to recover for the loss, if in fact you find there has been a loss suffered by the
212 wife that was proximately caused by the accident.

The relationship they sustain, that is, the husband and wife sustain to each other, is a special and peculiar one, and the actual facts of the case at hand must guide you in estimating the amount which fairly and justly compensate the wife for such loss, if any, if you find she has sustained loss. If you find from the evidence that the female plaintiff suffered the loss of comfort, society and assistance of the male plaintiff, her husband, as a proximate result of the accident, then such loss may be considered by you as an element of damage for the female plaintiff in the event you find her entitled to your verdict. You are only to consider whether the wife, the female plaintiff, is entitled to recover from the defendant, if and after you

shall have decided, if you do, that the defendant is liable to her husband, the male plaintiff, for damages.

You are instructed that if you find for the plaintiffs the amount of your verdict must be based upon the evidence as to plaintiff's injuries and losses. You are not to award speculative damage, that is, compensation which although possible is remote, conjectural or speculative. In other words, if you return a verdict for the plaintiffs, you are to base your verdict as to damages not upon conjecture or speculation but only as the preponderance of the evidence shows that damage has actually resulted to the plaintiffs from the matters complained of. Your
213 verdict for the plaintiffs, if you find for the plaintiffs, should be in such an amount as you determine will fairly and reasonably compensate the respective plaintiffs for the damage which you find they have sustained.

According to the Department of Health, Education & Welfare Tables of Mortality, to which counsel have stipulated, the expectancy of life of one aged 59 years is 16.63 years. Now this fact to which counsel have stipulated is now in evidence to be considered by you in fixing damages if you find that the said plaintiff is entitled to a verdict. However, this one factor of evidence is not by law controlling, but should be considered in connection with all of the other evidence bearing on the same issue, such as that pertaining to the health, habits and activity of the person whose life expectancy is in question.

Statements or arguments by the lawyers are not evidence. Their purpose is to aid you in analyzing the evidence, and they have importance in this regard. You are the triers and determiners of the facts and you are to determine what the facts are on the basis of your recollection and interpretation of all the evidence produced during the course of the trial.

Every case is to be determined without bias, prejudice or sympathy for or against either side and solely upon the testimony of the witnesses under oath, the evidence and the Court's instructions as to the law.

Now certain witnesses have testified in the trial of
214 this case as expert medical witnesses. You are instructed that a person who by education, study and experience has become an expert in any profession or calling, and who is presented as a witness, may give his opinion as to any matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound. And you are further instructed that if there is any conflict in the testimony of expert witnesses, it is your duty to reconcile the testimony if you can, but if you cannot do so, then you have a right to believe the witness or witnesses whom you deem more worthy of credit and disbelieve the witness whom you consider less worthy. And in weighing the testimony of the expert witnesses, as in all other testimony, it is proper for you to take into consideration all the surrounding circumstances of the witnesses, their interest in the result of the action if any, and their opportunity of knowing the truth of the matter about which they testify as experts, their qualifications, their ability and their willingness to expound fairly in reference to the subject matter upon which they were called upon to testify as experts.

At times during the trial the Court has been called
215 upon to make rulings on certain legal matters, that is, on questions involving the law. Rulings on questions of law are the concern of the Court solely. The jury's concern is solely with questions of fact and with the application of the Court's instructions to the testimony and the other evidence in the case as those instructions relate to your determinations of fact. Your verdict must not be influenced by the decisions on matters of law made by the Court during the trial except as those decisions are reflected in the Court's instructions to the jury. Through-

out the trial the Court has made rulings on the question as to whether certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings by the Court and are not to draw any inferences from it. Whether evidence offered is admitted or is admissible is purely a question of law for the Court's determination. In determining what evidence may be admitted to which an objection is made, the Court does not pass upon the weight which is to be given such evidence. A ruling by the Court permitting testimony to be given or other evidence to be introduced is not to be considered by you, the jury, as any indication as to what weight said testimony or other evidence may or may not have. What weight is to be given to evidence is strictly a matter for you, the jury, to determine for yourselves. Nor does the Court pass upon the credibility of any witness who
216 testifies. A ruling by the Court permitting a witness to testify or give evidence is not to be considered by you, the jury, as an indication as to what the credibility of that witness may or may not be. The credibility of a witness likewise is a matter strictly for you, the jury, to determine for yourselves. On the other hand, as to any offer of evidence that was rejected by the Court, you must of course not consider that evidence, and as to any question to which an objection was sustained, you must not conjecture or guess or speculate as to what the answer might have been or as to the reason for the objection or for the ruling of the Court.

If a witness is not produced at the trial who is peculiarly available to one side or the other, then the jury has a right, if it wishes to do so, and it is entirely within the jury's discretion, to draw the inference that the testimony of that witness would be unfavorable to the party that has failed to call a witness, unless the absence of the witness is sufficiently accounted for or explained. It is within the power of either side, by legal process, to ascertain the name of any witness known by the opposing side in the case.

You have now heard the Court's instructions. If in any of these instructions from beginning to end any rule, direction or idea be expressed in varying ways, that is, in differing ways, no emphasis is intended by me and
217 none must be inferred by you. For that reason you are not to center attention on any one instruction and disregard or ignore the others, but you are to consider all the instructions as a whole and to regard each instruction in the light of all the others.

The issues to be determined in this case are: first, was the defendant negligent? If you answer that question in the negative, that is, if you find the defendant was not negligent, then you will return a verdict for the defendant. If your answer is in the affirmative, that is, if you find that the defendant was negligent, then you have a second issue to decide, namely, was that negligence the proximate cause of any injury to the male plaintiff? If you answer that question in the negative, that is, if you find the defendant was negligent, but that such negligence did not proximately cause the injury claimed by the male plaintiff, then neither plaintiff is entitled to recover. If the answer is in the affirmative, that is, if you find that the defendant was negligent and that such negligence did proximately cause injury to the male plaintiff, then you must determine another issue; namely, whether male plaintiff was guilty of contributory negligence. If you find that the male plaintiff was guilty of contributory negligence and that contributory negligence was the proximate cause of injury to the male plaintiff, then neither plaintiff is entitled to recover. In that event your verdict
218 should be for the defendant. If you find there was negligence on the part of the defendant which proximately caused the male plaintiff to suffer injury, and that there was no contributory negligence on the part of the male plaintiff, then the male plaintiff is entitled to recover from the defendant for any damages you find he has suffered as a proximate result of the negligence of the

defendant. In the event that you find the defendant liable to the male plaintiff, you should then fix the amount of damages to which he is entitled. If you determine from a preponderance of the evidence that the male plaintiff is entitled to recover damages from the defendant, you should then decide what loss of her husband's services, if any, the female plaintiff has proved by a preponderance of the evidence that she suffered as the proximate result of such injuries as you find have been sustained by her husband because of negligence on the part of the defendant and fix the amount of damages, if any, to which you find she is entitled. As indicated in this instruction, you should first determine the question of liability.

Now, ladies and gentlemen of the jury, I want you to take this matter and consider it in the light of the instructions which I have given you, using the same ordinary common sense and ordinary intelligence which you would employ in determining any other important matter which you have occasion to decide in the course of your everyday life.

219 As you have been previously instructed, there are two causes of action to be considered here. The first is the action of the male plaintiff, Jeremiah J. McCarthy against the defendant, Florence M. Cahill. As to this cause of action your verdict may be either: one, in favor of the male plaintiff and against the defendant; or two, in favor of the defendant and against the male plaintiff. The remaining cause of action is the action of Anna Marie McCarthy, the female plaintiff, against the defendant, and as to that cause of action your verdict may be either: one, in favor of the female plaintiff and against the defendant; or two, in favor of the defendant and against the female plaintiff. If your verdict is for the male plaintiff, you will state the amount of said verdict against the defendant. If your verdict is for both male and female plaintiff, you will state the amount of damages to each respectively. You are again instructed that you may

not award damages to the female plaintiff unless you have first found, in accordance with these instructions, that the defendant is liable to the male plaintiff. If your verdict is for the defendant, you will simply state by your verdict that your verdict is for the defendant. This applies in both actions, the one of Jeremiah J. McCarthy, the male plaintiff, against the defendant, and the one of Anna Marie McCarthy, the female plaintiff, against the defendant, and of course as you well know, your verdict must be by
220 unanimous vote.

Before commencing your deliberations you will select one of your number Foreman. Whenever you shall have arrived at a verdict, notify the Marshal whereupon you will be escorted back to the courtroom to return your verdict. You will please remain in your seats in order that the Court may afford counsel on both sides, if they desire to do so, an opportunity to approach the bench.

Do counsel desire to approach the bench?

Mr. Murphy: Yes, Your Honor.

The Court: You may do so.

(At the Bench:)

The Court: All right.

Mr. Murphy: If Your Honor please, I understood your ruling when Mr. Davis was arguing a missing witness that there was no occasion for a missing witness instruction in this case.

The Court: No, I said I would give a missing witness instruction that would cut both ways.

Mr. Murphy: Then I object to the instruction. There is no basis for a missing witness instruction and I ask the Court to instruct the jury that on that basis none of the witnesses in this case are peculiarly available at the request of anybody.

The Court: That request is noted and denied.

221 Mr. Davis: While I am at the bench I wish to formally note an objection to the denial of plain-

tiffs' instructions two and three as drawn and I also respectfully note an objection to Your Honor's instruction on contributory negligence because of the fact there was no evidence of same. The defendant herself said she did not see the accident and the only one who testified on the accident was really the plaintiff, and the possibility of any contributory ngligence would be his merely stepping on the rug. I don't think there was any evidence of contributory negligence for submission to the jury.

The Court: That request is noted and that request is denied. Is there anything else?

Mr. Davis: Nothing further, Your Honor.

* * * * * * * * * *

223 **Verdict**

The Court: Put the members of the jury in the box in their regular places.

(Whereupon, at 5:25 p.m. the jury entered the jury box.)

The Clerk will take the verdict.

The Deputy Clerk: Will the Foreman please rise.

Are you the Foreman?

The Jury Foreman: Yes, ma'am.

The Deputy Clerk: Mr. Foreman, has the jury agreed upon a verdict?

The Jury Foreman: Yes, we have.

The Deputy Clerk: In the complaint of Jeremiah J. McCarthy against the defendant, do you find for the plaintiff or for the defendant?

The Jury Foreman: We find for the plaintiff.

The Deputy Clerk: In what amount?

The Jury Foreman: Would you repeat the question, please.

The Deputy Clerk: In what amount do you find for the plaintiff, Jeremiah J. McCarthy?

The Jury Foreman: We find for the plaintiff in the cash sum of $8,000.

The Deputy Clerk: In the complaint of Anna Marie
224 McCarthy do you find for the plaintiff or for the defendant?

The Jury Foreman: We find for the defendant.

The Deputy Clerk: For the defendant.

Will the jury panel please rise.

Members of the jury, your Foreman states that your verdict is that in the complaint of Jeremiah J. McCarthy against the defendant you find in favor of the plaintiff in the sum of $8,000, and in the complaint of Anna Marie McCarthy vs. the defendant you find in favor of the defendant, and this is your verdict so say you each and all?

The Jurors (In Unison): Yes.

The Court: Is there anything further, gentlemen?

Mr. Murphy: Yes, Your Honor. May we approach the bench?

The Court: All right.

(At the Bench:)

Mr. Murphy: If Your Honor please, at this time I would move that you declare a mistrial. We have an inconsistent verdict. The verdict for the defendant on the wife's claim and for the husband on his claim is inconsistent. You have to have at least nominal damages for the wife.

The Court: You may make that motion if you wish, but the Court will overrule the motion.

Mr. Murphy: I cannot cite Your Honor the case,
225 but there is a case on point in the District of Columbia that says when it is for one spouse and against the other, it is inconsistent.

Mr. Davis: Clark vs. Landsburgh is the case you are thinking of, but the situation was reversed in that case. The verdict was for the husband who sustained no injury. In this case the verdict was for the husband who sustained the injury. The jury could very well have found that there was no loss of consortium.

The Court: At any rate you made your motion. I will overrule your motion.

Rich Sharp
2-27-67
7-Neg.-T
9:30 am
(2)

BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,363

FLORENCE M. CAHILL,

Appellant,

v.

JEREMIAH J. McCARTHY
and
ANNA MARIE McCARTHY,

Appellees.

Appeal from the United States District Court
for the District of Columbia

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Attorney for Appellees

STATEMENT OF THE QUESTIONS PRESENTED

In the opinion of the appellees, the questions involved here are:

(1) In this split-issue trial of an ordinary negligence action (a slip-and-fall case involving an admitted invitee), was there sufficient evidence

(a) of fraud in the procurement of the alleged "release" to void same, and

(b) of negligence in proximately causing the proven injuries and consequential damage sustained by the male plaintiff?

Appellees respectfully submit that the answer to both questions should be in the affirmative, as found by the two separate juries involved, and as subsequently affirmed by the two separate trial courts in denying motions for judgment n.o.v. or for new trial.

INDEX

TABLE OF CASES

Miscellaneous:

* Cases chiefly relied upon are marked with an asterisk.

United States Court of Appeals

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

The statement of the case as set forth in appellant's brief is substantially correct, and appellees will not repeat same herein, but do desire to make certain comments with respect to appellant's statement of the case.

In speaking of the separate trial of the validity or invalidity of the alleged "release", appellant states on page 2 of her brief: "Judge Sirica indicated that he was *astonished* at the result reached by the jury on the evidence, * * * * "Nowhere in this entire record is there any indication that Judge Sirica was "astonished" by the verdict of the jury invalidating this alleged "release". On the contrary, he wrote a scholarly opinion affirming the verdict of the jury (249 F. Supp. 194), which is reproduced in the Appendix of appellant's brief at page 21 thereof. The judge might have indicated, in two places in his opinion, that if the matter were tried non-jury, his finding might have been different from that of the jury, because he indicated, on page 24 (App.): "While this Court does not believe from the evidence that the insurance agent intended to mislead the plaintiffs, or that he knowingly made any false statements to the plaintiffs, *the fact that the Court would have found in favor of the defendant* does not mean that the jury's verdict should, for that reason alone, be set aside. Although the Court has the right to comment to the jury on the evidence, it is not the trier of the facts. * * * *" And again, on App. 25, he stated: "* * * * This Court is a great believer in the jury system and *although it may sometimes disagree with a jury verdict*, it will not set one aside unless it is clearly erroneous."

Judge Sirica's opinion fully sets forth the disputed facts concerning the release issue, which disputed facts presented a typical jury question.

On App. 5, appellant admits that the compensation carrier, Firemens' Fund, which had paid the early medical expenses of plaintiff and a portion of his loss of earnings, "in the due course of business put Ellett & Short on notice of a claim for subrogation. Later, Mr. Antoniacci of Ellett & Short was informed that the Firemens' Fund did not intend to press subrogation rights."

There is no evidence in the record, aside from Antoniacci's, to this latter statement; nor is there any evidence that such non-intention to press subrogation rights was ever communicated to plaintiff. On the

contrary, from documentary evidence offered and received on behalf of plaintiff, it appears that Firemens' Fund was pressing its subrogation rights through this very case. The reason that further compensation was not paid to plaintiff was due to the existence of the alleged "release". See Plaintiff's Exhibit 14-A, in which counsel for the compensation carrier, in notice to the Bureau of Employees Compensation, amended its answer to plaintiff's compensation claim as follows:

> "That the carrier is not liable for the payment of compensation benefits and/or medical treatment by reason of the claimant's unauthorized settlement of the third party claim without the written approval of the carrier in violation of Section 33(g) of the Workmens' Compensation Act."

On App. 6, near the bottom, appellant states:

> "* * * * The physical difficulty in incurring the injury which Mr. McCarthy incurred, in the manner in which Mr. McCarthy testified he incurred it, was amply demonstrated in final argument by plaintiff's counsel when in demonstrating how the accident occurred according to Mr. McCarthy and following Mr. McCarthy's testimony step by step, Mr. Davis lurched forward presenting his right shoulder to the imaginary table."

None of this is corroborated by the record. In fact, on App. 137, counsel for appellant stated: "Now, take it from me, Mr. McCarthy. I'm the one who is demonstrating your movements at the moment."

ARGUMENT

I.

THERE WAS SUFFICIENT EVIDENCE OF FRAUD IN THE PROCUREMENT OF THE ALLEGED "RELEASE" FOR SUBMISSION TO THE JURY.

It must be remembered that the star witness for the defendant, on the issue of the validity or invalidity of the alleged release, was one Gene E. Antoniacci, claims manager for Ellett & Short, who were general

agents for the Phoenix Insurance Company of New York, which company carried the comprehensive personal liability insurance on the defendant in this case (App. 75). Although he was not a member of the bar, he was a graduate law student, having received his LL.B. degree in 1960 (a year and a half before the alleged "release" of December 20, 1961 was signed). He had only seen the male plaintiff personally on two occasions; the first time being on January 12, 1961 (approximately three weeks after the accident of December 23, 1960), on which occasion he took a signed statement of facts from the male plaintiff, saw and noted his physical condition, plaintiff then being in a cast, and was informed by plaintiff that plaintiff's compensation carrier was paying his medical expenses and part of his loss of earnings. (App.84,85,86). From then on, for approximately a year, Antoniacci contacted the plaintiff by telephone once a month (App.75).

The question naturally arises, why? It obviously must have been in connection with plaintiff's claim against defendant, which admittedly plaintiff did not desire to press, unless absolutely necessary, in view of their cordial relationship. And during this same intervening year, Antoniacci had secured from plaintiff's compensation carrier copies of all medical reports bearing on the nature and extent of plaintiff's injuries (App.78).

And then he makes the second personal visit to plaintiff, on December 20, 1961 (three days less than a year after the injury), at which time he secures the so-called 'release', after ingratiating himself with plaintiff by discussing his own eye condition, seeking information as to how to join the Knights of Columbus, and other general Christmas talk in view of the impending holidays. (App.87). In fact, he made himself so congenial with the McCarthy's, that plaintiff requested his daughter (then in an adjoining room wrapping Christmas presents) to present Antoniacci with a bottle of Old Crow whiskey.

In fact, appellant admits on page 13 of her brief, as follows:

"However, culling the various claims of the plaintiffs, *there was some evidence that the agent for Ellett & Short, Mr. Antoniacci, represented that the first paper signed by the McCarthys was a receipt"* (emphasis ours). Appellant then argues, however, that such representation was "not material".

An almost analagous situation was presented in - *SAINSBURY V. PENNSYLVANIA GREYHOUND LINES, Inc.*, 183 F.2d 548 (C.A., 4 Cir., 1950), in which plaintiff, a member of the U.S. Navy, sustained serious injuries while a passenger on defendant's bus. He was hospitalized at the Naval Hospital at Annapolis for more than three months. A claims adjuster for the defendant bus company visited plaintiff in the hospital once, four or five days after the accident, and again about three weeks after the accident. On this second visit, the claims adjuster (who was, incidentally, an attorney-at-law), told plaintiff that his claim was not worth more than $500.00, because "those in the service, like the plaintiff, were in a different situation in the eyes of the law because they obtained from the Government, free of charge, medical and hospital care and also were entitled to disability payments in the event of injury, so that in his present case, he would be entitled to recover from the defendant on account only of the pain that he may have suffered as a result of his injuries." By reason of such representation, he induced plaintiff to sign a release for $500.00

In voiding such release for fraud, Judge Dobie, speaking for a unanimous court consisting also of Judge Soper and Chief Judge Parker, stated:

> "The representation by Weston (the adjuster) to plaintiff that because he was in the service he could recover only for pain and suffering was a false statement of the law. It is generally well settled that the fact that the plaintiff may receive compensation from a collateral source (or free medical care) is no defense to an action for damages against the person causing the injury.* * * * *

"It is inconceivable that any member of the bar could have made a statement such as the one made by Weston without knowledge of its falsity or without acting with a reckless disregard for the truth.

"The rule is also well established that when a lawyer makes a misrepresentation of law to a layman relief may be afforded, even though the layman knows the lawyer represents an antagonistic interest. Any other rule would be unconscionable."

And in another Fourth Circuit case, *BISHOP V. E.A. STROUT REALTY AGENCY,* 182 F.2 503,505, which was an action for deceit based on the fraudulent representations of a real estate agent concerning the depth of water at a fishing camp, Chief Judge Parker said:

"We do not think that plaintiffs are precluded of recovery because they accepted and relied upon the representations of Davis as to the depth of the water without making soundings or taking other steps to ascertain their truth or falsity. The depth of the water was not a matter that was apparent to ordinary observation; Davis professed to know whereof he was speaking; and there was nothing to put plaintiffs on notice that he was not speaking the truth. *There is nothing in law or in reason which requires one to deal as though dealing with a liar or a scoundrel, or that denies the protection of the law to the trustful who have been victimized by fraud.* The principle underlying the caveat emptor rule was more highly regarded in former times than it is today; *but it was never any credit to the law to allow one who had defrauded another to defend on the ground that his own word should not have been believed.****

"The modern and more sensible rule is that applied by the Court of Appeals of Maryland in *STANDARD MOTOR CO. v. PELTZER,* 147 Md. 509, 510, 128 A.451, where it was held not to be negligence or folly for a buyer to rely on what had been told him. This is in accord with the modern trend in all jurisdictions which is summed up in A.L.I. Restatement of Torts, sec. 540 as follows: *The recipient in a business transaction of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation."* (emphasis ours)"

In - *McGRATH V. PETERSON,* 127 Md. 412, 96 A. 551, 553, the Court of Appeals of Maryland set out an even more liberal rule in regard

to avoiding contracts for fraud than obtains in the case of an action for deceit, stating that: 'In an action by one party against the other to enforce the contract, a plea of fraud may be sustained, even though the defendant may have been wanting in ordinary prudence in relying on the other's representations as to the tenor or contents of the writing."

To the same effect is - *MEYERS V. MURPHY, 181 Md.98, 28 A.2d 861.*

Judge Dobie, in Sainsbury, supra, further commented:

'In the case before us the reasons for vitiating the release are more cogent than in any of the cases which we have cited. Lawyers are, or should be, regarded as possessed of knowledge and integrity beyond that of most of their fellows, certainly above the level of the market place. We find nothing unreasonable or imprudent in the reliance of the plaintiff upon the words of this attorney who had won the plaintiff's confidence through his friendly overtures and through his membership in an honorable profession. As between the parties to the release it is, of course, immaterial whether the fraud is of the factum or the inducement."

The only difference between the claims adjuster in *Sainsbury*, supra, (a man named Weston), and the adjuster in the instant case, Antoniacci, is that Weston had taken a bar examination and was a member of the bar. Antoniacci, at the time he induced the plaintiff to sign the release in the instant case, was a claims adjuster, and was a full-fledged law graduate holding the degree of LL.B., although he never took a bar examination. He had been retained in employment, however, by his employer, Ellett & Short, even after getting this 'release', and promoted to the position of 'Claims Manager', which position he held on November 18, 1965 which was the date of the jury verdict voiding the 'release' for fraud; and he still holds the position of 'claims manager' with the same employer.

Our sister jurisdiction to the south, Virginia, has the same attitude regarding the question of fraud. In - *UNION TRUST CORPORATION V. FUGATE*, 200 S.E. 624 (1939), a proceeding based upon a charge of fraud and deceit, involved a transaction whereby certain notes for the payment

of money were alleged to have been sold upon false and untrue representations that they were secured by a deed of trust constituting a first lien upon real estate, when in fact they were not, because the clerk of the court did not receive the recording fee and accordingly did not record the deed of trust. The jury found a verdict for the plaintiff, and the trial court sustained the verdict. On appeal, the Supreme Court of Appeals of Virginia affirmed the verdict and judgment. In speaking for a unanimous court, Judge Spratley stated:

> "The right to recover in this case is based upon constructive fraud rather than actual fraud. It is conceded that there was no intentional misrepresentation. The question of intention is immaterial if the representation was false and resulted in damage to one who relied on it as being true. * * *
>
> "The trial judge, who saw and heard the witnesses, took the same view, although he stated that if he had been on the jury he might have favored a different verdict. He recognized, however, that the jury were the sole judges of the weight of the evidence, and the credibility of the witnesses, and that since there was credible evidence to support their verdict, it could not be disturbed. (citing cases)."

II.

THE CLAIM OF FRAUD IN THE PROCUREMENT OF THE ALLEGED "RELEASE" WAS NOT BARRED AS A MATTER OF LAW BY REASON OF ANY ALLEGED FAILURE OF PLAINTIFF TO PROMPTLY NOTIFY THE DEFENDANT OF THE CLAIM OF FRAUD.

Appellees respectfully submit that there is no law which requires a third-party claimant, under circumstances of this case, to "notify a defendant of a claim of fraud."

By reason of the friendship of the plaintiff and defendant over a number of years, plaintiff did not *want* to make any claim against defendant, unless, of course, same became absolutely necessary. Accordingly, he had made claim against his compensation carrier, and was

receiving compensation at the time defendant's claim adjuster made his first personal visit to plaintiff. And this compensation, and an award for permanent disability, would have been ultimately made, had it not been for the so-called 'receipt' for $135.00 paid, which ultimately turned out to be a purported 'release', whereupon the compensation carrier refused to make any further payments of compensation, or an award for permanent disability, defending on the ground that plaintiff had "settled" his third-party claim without the written consent of the compensation carrier. It was then and then only that plaintiff, being without counsel all along up to that time, found himself in the dilemma of being deprived of BOTH workmens' compensation and his third-party claim, this being at the scheduled 'informal conference' before the Bureau of Employees' Compensation in August, 1962, as supplemented by the letter of September 7, 1962 from counsel for the compensation carrier to the Claims Examiner of the workmens' compensation board. The compensation carrier had made such payments as it had, to plaintiff, up to that time, on a voluntary basis, there being no award formally. Nevertheless, they were subrogated to any rights plaintiff had against a third party, to the extent of any payments they had made. Yet although almost two years had elapsed from the original injury, the compensation carrier did nothing about proceeding with any third-party action, although it had been in constant communication with defendant's insurance carrier, had even furnished defendant's insurance carrier with copies of all medical reports, itemization of payments made, etc.

When plaintiff filed his action originally against the defendant here, the defendant, by counsel, plead the alleged 'release' as an affirmative defense; and in fact, filed a motion for summary judgment based upon the alleged 'release', which motion was later withdrawn and not argued.

In - *WYNN V. KELLEY*, 223 F. Supp.875 (1963), the United States District Court for this District, Holtzoff, J., under analagous circumstances, ruled:

"In other words, subsection (d) places a limitation on the assignment. It is not an assignment for all purposes. It confers on the employer the right to institute and maintain proceedings or to compromise the claim with such third person. *It does not authorize him to do nothing about it.* * * *

"To go back to subsection (d) that provision indicates that the assignment to the employer is not an absolute or complete assignment but confers on the employer certain limited powers. *It does not confer upon him the power to abandon the action.* * * *

"* * * * * the conclusion is nevertheless reached that if the employer, after the claim is assigned to him by operation of law, fails within a reasonable time to institute suit or to secure a compromise of the claim, the injured employee may, within the period limited by the applicable statute of limitations, bring suit in his own name, and, therefore, he has the capacity to sue."

Therefore, Argument II of the appellant, is given short shrift by a reference to - *CAPITAL TRACTION CO. V. SNEED,* 58 App.D.C.141, 26 F.2d 296, certiorari denied, *Capital Traction Co. v. Newmyer,* 278 U.S. 604, 49 S. Ct.10, 73 L.ed 531, wherein it was held that laches, or undue delay in renouncing a release of liability for personal injuries after discovery of fraud, was a question of fact for the jury. The jury in the instant case heard the same argument as is now being made to this Court, and ruled against appellant on this point.

III.

THERE WAS SUFFICIENT EVIDENCE OF NEGLIGENCE ON THE PART OF THE DEFENDANT.

It must be remembered that the plaintiff in this action was a business invitee. That fact was admitted by the defendant. He was not a social guest. The duty owed by an invitor to a business invitee was fully explained to the liability jury.

Plaintiff himself was the only witness to the accident. He testified that at defendant's request, he had purchased for her a Zenith model table radio which she desired to present to her daughter as a Christmas present; he made the delivery to defendant's home on December 23, 1960; he was admitted to the home by defendant's maid, who advised him that defendant was upstairs in a den, that he was to make the delivery to the den, which he did, and at which time defendant paid him for the radio; that on descending the circular stairs, and reaching the bottom thereof, his right foot stepped upon a 3' x 5' scatter rug placed at the foot of the stairs; that this rug was unattached to the floor, or otherwise secured, and the weight of his foot and body caused same to slip, on the polished vinyl tile floor, precipitating him into an Italian marble table, which he struck with his face and left shoulder, causing the injuries in question. The stairs themselves were covered with a red carpeting, which was secured by nails to the stairs, but the said scatter rug was not.

The defendant herself did not see the accident; she heard the thud of plaintiff's fall, as did the maid, both of whom then rendered first aid to plaintiff, after which he left the premises.

The defendant admitted that the floor surface was a polished vinyl tile, installed just one week before the accident; she admitted the presence of the scatter rug, and that same had just been placed there that day, for the purpose of absorbing snow, or wetness from shoes, as it was snowing that date. A certified copy of the weather bureau for that date showed that it had not snowed for some time, that the weather that day and the preceding day entailed 100% sunshine.

A very similar factual situation existed in - *BROSOR, Admx. v. SULLIVAN*, 109 A.2d 862 (N.H., 1954) in which the Supreme Court of New Hampshire affirmed a jury verdict for plaintiff in a slip-and-fall case on a scatter rug, in which a rent-paying member of the family sustained serious injury. There, the New Hampshire court stated:

> " * * * * * This case has a special circumstance not always present, in that the decedent had no reasonable choice open to him to avoid slipping on the unfastened rug. "He had no other means of ingress or egress." Papakalos v. Shaka, 91 N.H. 265, 269, 18 A.2d 377, 379. See English v. Amidon, 72 N.H. 301, 303, 56 A. 548. This was a factor to be considered on the issue of the defendant's negligence as well as being relevant to the issue of the decedent's contributory negligence. A holding that the defendant was free from negligence as a matter of law in this case would be tantamount to saying that which is dangerous in fact is not dangerous in law and therefore we do not so hold. The question of the defendant's negligence was properly submitted to the jury."

In *BROSOR*, supra, to enter the decedent's bedroom, he had to go through the living room of the house. That was the only means of ingress or egress to the bedroom. The scatter rug there was in front of the bedroom door.

In the instant case, involving a 3' x 5' scatter rug, placed on a polished vinyl floor at the foot of a circular stairway, the plaintiff had to step on such rug to ascend the stairs, as he likewise had to step on same in descending the stairs. There was no other way to use the stairs, unless he jumped over the said three feet by five feet scatter rug. Furthermore, he had, and was given no notice whatsoever that said rug was not in some fashion secured to the floor, for which reason he had a right to assume that it was safe for normal use.

IV

ALLEGED ERROR AS TO THE MISSING WITNESS.

This alleged point is so flimsy as to require but little discussion. At the first of the split-issue trial involved in this case, on the question of the validity or invalidity of the alleged release, counsel for plaintiff learned from the admission into evidence of Defendant's Exhibit 3, the so-called 'Adjustor's Topical Report', which was highly prejudicial to

plaintiff, and was admitted over strenuous objection, that aside from plaintiff there were no witnesses to the accident.

However, at the second split-issue trial, on the issue of liability and damages, plaintiff was obliged to call defendant, as an adverse witness under Rule 43 (b), F.R.C.P. Her testimony, as an adverse witness, was in several respects diametrically opposed to plaintiff's. In the first place, on the question of who admitted plaintiff to the defendant's premises on the day in question; plaintiff having testified that it was defendant's maid, who directed him to make the delivery to the up-stairs den, whereas defendant testified that she "thought" that she herself had admitted plaintiff. Again, as to the weather conditions prevailing on the outside, and any alleged necessity for a scatter rug in the position it was at the time of plaintiff's fall, plaintiff had testified that it was neither raining or snowing outside on the day in question, whereas defendant testified it was snowing. The weather bureau certificate, offered and received in evidence, showed that it had not snowed for several days prior to the day in question, and that on that date there was 100% sunshine, as had been the condition the day previous.

Plaintiff, nor his counsel, even knew the name of the said maid until same was elicited from the defendant on the day of her examination as an adverse witness, as one Hannelore Tranker, who had, since the accident, married one McDowell, a teacher in a college in Winston-Salem, N.C. (App.150). And then it developed that defendant had had contact with said maid as late as July, 1965, in connection with the maid's naturalization.

The maid could have corroborated the defendant, if produced, in the above, and other respects. Therefore, even if plaintiff or his counsel knew of the identity of the maid, he could not have produced her, she being beyond the range of subpoena of the trial court. And having been a

former employee of defendant, and still on friendly terms with defendant as late as July, 1965, said maid was at least more available to defendant than to plaintiff.

It is respectfully submitted that the argument as to the unexplained absence of the said maid, who had at least heard the thud of plaintiff's fall, assisted in his emergency first-aid treatment, and who was admittedly present during any conversations of the defendant with plaintiff after the fall, would have shed much light as to the factual truth of the situation, and was a proper and usual argument to the trial jury.

CONCLUSION

In view of the foregoing authorities and argument, it is respectfully submitted that in view of the fact that two juries, and two separate trial courts, have heard the material evidence in this case, as to all issues, and have affirmed same by denying the usual motions for new trial and/or judgment n.o.v., that the judgments appealed from should be affirmed.

Respectfully submitted,

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